

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921

No. 276

UNITED FUEL GAS COMPANY, PLAINTIFF IN ERROR,

vs.

WALTER S. HALLANAN, STATE TAX COMMISSIONER OF
THE STATE OF WEST VIRGINIA, AND E. T. ENGLAND,
ATTORNEY GENERAL OF THE STATE OF WEST VIR-
GINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE
OF WEST VIRGINIA.

FILED MARCH 21, 1922.

(98,192)

(28,192)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 835.

UNITED FUEL GAS COMPANY, PLAINTIFF IN ERROR,

vs.

WALTER S. HALLANAN, STATE TAX COMMISSIONER OF
THE STATE OF WEST VIRGINIA, AND E. T. ENGLAND,
ATTORNEY GENERAL OF THE STATE OF WEST VIR-
GINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE
OF WEST VIRGINIA.

INDEX.

	Original.	Print
Record from circuit court of Kanawha County.....	1	1
Summons	1	1
Order filing bill and motion for injunction.....	2	1
Bill of complaint.....	5	3
Notice of motion for injunction.....	38	23
Exhibit "A"—Act of legislature filed with bill.....	40	24
Exhibit "B"—Tax return filed with bill.....	46a	28
Exhibit "Map" filed with bill.....	46c	29
Order for continuance.....	47	30
Order for continuance.....	48	30
Joint and separate demurrer and answer.....	50	31
Exhibit No. 1 with Answer—Charter.....	67	42
Order for continuance.....	83	49
Order for continuance.....	84	49
Order for continuance.....	85	50
Stipulation as to facts.....	86	50

	Original.	Print.
Exhibit with Stipulation—Certificate of incorporation.....	96	56
Order of submission.....	106	62
Final order and decree.....	108	63
Certificate of clerk of circuit court.....	111	65
Order allowing appeals and granting leave to make motion to reverse	114	65
Petition for appeal.....	116	66
Notice of motion to reverse.....	120	68
Orders of submission.....	123	70
Final order and decree.....	124	71
Opinion supreme court of appeals.....	125	72
General order of suspension.....	132	90
Order refusing rehearing.....	163	91
Petition for rehearing.....	164	91
Order suspending decree for 90 days from January 12, 1921....	190	104
Bond given under suspension order.....	191	105
Petition for writ of error.....	193	106
Order allowing writ of error.....	201	111
Assignments of error.....	202	111
Copy of bond.....	207	114
Writ of error.....	211	118
Citation	214	119
Certificate of clerk supreme court of appeals.....	216	120

1 RECORD.

Summons in Chancery.

The State of West Virginia to the Sheriff of Kanawha County, Greeting:

We command you that you summon Walter S. Hallanan, as Tax Commissioner of the State of West Virginia, and E. T. England, as Attorney General of the State of West Virginia, if they be found within your bailiwick, to appear before the Judge of our Circuit Court for the County of Kanawha, at Rules to be held in the Clerk's office of said Court, on the first Monday in September next, to answer a bill in Chancery exhibited against them in our said Court, by United Fuel Gas Company, a corporation, and have then there this writ.

Witness, A. P. Hudson, Clerk of our said Court, at the Court House of said County, on the 26th day of August, 1919, and in the 57 year of the State.

A. P. HUDSON,
Clerk.

2 Endorsed on back: (1½.) No. 5433. Kanawha Circuit Court, September Rules, 1919. United Fuel Gas Co. vs. Walter S. Hallanan, as Tax Commissioner, et al. Summons in Chancery, and 2 Copies. B. J. & K. R. G. A. Atty.

Executed the within process on the within named Walter S. Hallanan as Tax Commissioner of State of West Va. on the 27 day of Aug., 1919, by delivering to him in person a true copy thereof in Kanawha County, West Virginia.

S. B. JARRETT,
S. K. C.,

By J. L. CARNEY,
D. S. K. C.

Executed the within process on the within named E. T. England as Atty. General of the State of West Va. on the 27 day of Aug., 1919, by delivering to him in person a true copy thereof in Kanawha County, West Virginia.

S. B. JARRETT,
S. K. C.,

By J. L. CARNEY,
D. S. K. C.

In Chancery.

No. 5433.

UNITED FUEL GAS COMPANY, a Corporation,

vs.

WALTER S. HALLANAN, as State Tax Commissioner of the State of West Virginia, and E. T. England, as Attorney General of said State.

This day came the plaintiff, United Fuel Gas Company, a corporation of the State of West Virginia, by its counsel, and tendered for filing its bill of complaint duly verified and the exhibits therein mentioned, against the defendants, Walter S. Hallanan, as Tax Commissioner of the State of West Virginia, and E. T. England, as Attorney General of said State, praying an injunction inhibiting and restraining the defendants and all persons acting under the direction or control of them, or either of them, from enforcing against the
3 plaintiff any of the terms or provisions of a certain statute enacted at the Extraordinary Session of the year 1919 of the Legislature of said State, known as Chapter V in the records of said session, and entitled "An Act to levy a privilege tax on any person, firm or corporation engaged in the transportation of crude oil or petroleum, or the distillates thereof, or of natural gas, by means of pipe lines, authorizing the state tax commissioner to provide rules and regulations for the collection of such tax, and defining the duties of the state tax commissioner;" and particularly praying that said defendants be enjoined and restrained from enforcing or attempting to enforce against the plaintiff those provisions of said statute requiring the plaintiff to make a return or report in writing to the State Tax Commissioner of the natural gas transported, by the plaintiff, by means of pipe lines, in the State of West Virginia, during the year ending July 1, 1919, and subsequent years, that provisions requiring payment by the plaintiff of the tax at the rate of one-third of one cent per thousand cubic feet for the natural gas so transported for the purposes mentioned in said statute, and that provision purporting to impose fines and penalties upon the plaintiff for continuing in the conduct of its business without securing the license mentioned in said statute. At the same time, the plaintiff tendered for filing a written notice given by it on the 25th day of August, 1919, to each of the said defendants, that an application would be made at this time and place for a temporary injunction as prayed for in said bill.

Upon consideration thereof, leave is granted to the said plaintiff to file, in open court its said bill of complaint, and the same is accordingly filed, and the Clerk of this Court is directed to issue process thereon against the said defendants, returnable to the September Rules, 1919.

Thereupon the plaintiff moved the Court to award to it, until the

4 further order of the Court, an injunction against the defendants, as prayed for in said bill of complaint, and the matters arising upon such motion for such temporary injunction are set down for hearing on the 15th day of August, 1919.

(Endorsed on back:) (2.) United Fuel Gas Company, Plaintiff, vs. Walter S. Hallanan, as State Tax, Com'r, &c., et al., Defendants. In Chancery. Order. H. D. Rummel, Judge. Entered in Chanc. Order Book Aug. 26, 1919, No. 42, Page 28.

In the Circuit Court of Kanawha County, West Virginia.

In Equity.

UNITED FUEL GAS COMPANY, a Corporation, Plaintiff,

vs.

WALTER S. HALLANAN, as Tax Commissioner of the State of West Virginia, and E. T. England, as Attorney General of the State of West Virginia, Defendants.

5 *Bill of Complaint.*

To the Honorable H. D. Rummel, Judge of the Circuit Court of Kanawha County, West Virginia:

United Fuel Gas Company, a corporation of the State of West Virginia, brings this, its Bill of Complaint, against Walter S. Hallanan, as Tax Commissioner of the State of West Virginia, and E. T. England, as Attorney General of the said State, and thereupon your orator complains and says:

I.

Your orator, United Fuel Gas Company, is a corporation organized and existing under and by virtue of the laws of the State of West Virginia, and has its principal office in the State of West Virginia, at the City of Charleston, in said State.

II.

Each of the defendants is a citizen and resident of the City of Charleston, in the County of Kanawha and State of West Virginia. The defendant Walter S. Hallanan is the Tax Commissioner of the State of West Virginia, duly and regularly appointed and qualified, and as such is charged generally with the administration of all the tax laws of the said State and particularly with the administration of the statute enacted by the Extraordinary Session of the Legislature of said State of the year 1919, which statute is hereinafter referred to and complained of as being unconstitutional and void. The defendant E. T. England is the lawfully elected and qualified Attorney General of the said State of West Virginia, and as such is charged with the enforcement of all the criminal laws of said

- 6 State and the collection, by legal proceedings, of all penalties accruing to the said State under the provisions of any statute providing penalties for the violation thereof.

III.

Your orator was incorporated under the laws of the said State of West Virginia by virtue of a certificate of incorporation from the Secretary of State, bearing date the 1st day of February, 1916, under the name of Kermit Gas Company, for the purpose of purchasing, acquiring and taking over, as a going concern, and to maintain and operate, all of the works, assets, property and franchises of every character whatsoever of that certain corporation organized with the name of United Fuel Gas Company, under a certificate of incorporation bearing date the 7th day of March, 1903, issued by the Secretary of State of the State of West Virginia. Immediately after its said incorporation, your orator did purchase, acquire and take over, as a going concern, all the works, assets, property and franchises of every character of that certain corporation organized under the name of United Fuel Gas Company under a certificate dated the 7th day of March, 1903, and has ever since owned and operated all of the works, assets and property so acquired, and continues so to do, but sometime in the month of February, 1916, your orator changed its name, in the manner provided by law, from Kermit Gas Company to United Fuel Gas Company, the latter being now its corporate name as set forth in the caption of this, its bill of complaint. By deed bearing date the 1st day of January, 1916, said former United Fuel Gas Company (incorporated March 7, 1903,) granted, conveyed, transferred and set over to your orator all of the property of every character owned by said former United Fuel Gas Company, and said business has continued, uninterruptedly, to the present

- 7 time, your orator operating in every respect as the successor of said former company, and your orator being also the owner of all the property and rights of said former company and having assumed and become liable for all of its debts and obligations, so that the business hereinafter described as conducted by your orator will be referred to in such manner as to include the business conducted by its said predecessor. Your orator's said predecessor in title was incorporated as a subsidiary of the Ohio Fuel Supply Company, the latter being a corporation organized and existing under the laws of the state of Ohio, and said Ohio Fuel Supply Company has been engaged for a number of years, and is now extensively engaged, in the transportation, distribution and sale of natural gas to consumers thereof in said State of Ohio, the same being so distributed and used by means of pipe lines and other appliances for the heating and lighting of dwelling houses and other purposes. The primary purpose of the incorporation of your orator's said predecessor in title as a subsidiary of the said Ohio Fuel Supply Company was to acquire, hold, operate and maintain a reserve supply of natural gas for the customers of said Ohio Fuel Supply Company, all residing in

the State of Ohio, there having been discovered previous to the incorporation of your orator's said predecessor in title, large fields of natural gas in the State of West Virginia for which there was at the time no available market, and your orator's predecessors shortly after its incorporation, proceeded to acquire, and did acquire, by purchase and by lease, numerous tracts of land underlaid with valuable deposits of natural gas, and bored a large number of wells upon said land productive of natural gas, constructed pipe lines and equipped itself generally to transport natural gas from the points of production on the lands held and operated by it in the State of West Virginia, to or near the boundary line between said State and State of Ohio,

8 for the purpose of furnishing and delivering such natural gas to the said Ohio Fuel Supply Company for transportation, distribution and sale thereof by said latter Company to persons desiring to purchase and use the same in said State of Ohio. Your orator was authorized by the terms of its certificate of incorporation to engage in the business of producing and marketing natural gas, and of transporting such natural gas by means of pipe lines, and it is now and has been continuously, since its incorporation, engaged in such business.

IV.

In the month of September, 1909, your orator's said predecessor in title made extensive purchase of additional property, consisting of lands, leases, gas wells and other materials suited for the production and transportation of natural gas, and included also the natural gas property of a corporation known as the United States Natural Gas Company, which latter consisted of lands, leases, gas wells and pipe lines, some of which pipe led from the points of gas production in the State of West Virginia to cities and towns in the States of Kentucky and Ohio, and were, at the time of said purchase, and have been at all times since, and still are, used for the transportation and delivery of natural gas to consumers thereof in the three States of Kentucky, Ohio and West Virginia.

V.

Your orator avers that it is now, and has been continuously since its incorporation, engaged in commerce between the States of the United States; that is to say, it is now and has been continuously since the date of its incorporation, engaged in the production and purchase of natural gas in the State of West Virginia and Kentucky, the greater part of which gas so produced and purchased in said States of West Virginia and Kentucky is transported, in some instances altogether, and in some other instances in part, by means of pipe lines owned and operated by your orator, into other States for sale and consumption. Your orator is now, and has been since the date of its incorporation, the owner in fee of the natural gas underlying numerous tracts of land in West Virginia, from which it is producing, and has been producing dur-

ing said period, large quantities of natural gas, by means of wells drilled and operated thereon by it. Your orator is also the owner at this time, and has been since the date of its incorporation, of valid and existing leasehold estates upon several hundred thousand acres of lands in the State of West Virginia and several thousand acres in the State of Kentucky, by the terms of which leases your orator is invested with the exclusive right to mine, produce, utilize and market, as its own, all of the natural gas produced from such lands, and your orator has been, and still is, engaged extensively in the business of producing natural gas from said leased land, by means of wells drilled thereon, and transporting the same by means of pipe lines, and, in some instances, delivering the same to consumers thereof, while in other instances to other companies, who continue the transportation of such gas, by means of pipe lines, to the ultimate consumers thereof. Your orator also purchases gas from other producers thereof, at or near the points of production, in the States of West Virginia and Kentucky, which gas so purchased is commingled and transported with the gas produced by your orator, and the whole of the gas so taken into the pipe lines owned and operated by your orator, whether the same was produced from wells owned or held under lease by your orator or from wells upon lands operated by others and purchased by your orator at or near such wells, is transported by your orator, by means of pipe lines, in some instances to points within the State of its production, and in other instances to and across the boundary line between such State and some adjoining State, where it is delivered to purchasers and users thereof. In the year ending July 1, 1919, your orator produced, transported and sold from the wells owned and operated by it, upon lands in which it was the owner of the natural gas in fee or upon which it was the owner of a valid lease authorizing it to take and use the natural gas thereunder, 41,700,973 M cubic feet of natural gas, of which total quantity approximately 40,866,953 M cubic feet was produced from wells upon lands located in the State of West Virginia, and approximately 834,020 M cubic feet from wells upon lands located in the State of Kentucky. During said year ending July 1, 1919, your orator also purchased from other producers and transported and sold 13,172,615 M cubic feet of natural gas, of which total quantity approximately 12,762,838 M cubic feet was produced from lands located in the State of West Virginia and purchased by your orator in said State, and approximately 409,777 M cubic feet was produced from lands located in the State of Kentucky and purchased by your orator in said last mentioned State. The quantity of gas above mentioned as having been produced by your orator in the year ending July 1, 1919, is the balance remaining of the sum of the quantities as determined by the meters used by your orator in selling and disposing of the same, (and in addition, an estimate of a comparatively small quantity sold at flat rates without measurement) after deducting the quantity purchased, and the quantity of gas above referred to as having been purchased by your orator in the year ending July 1, 1919, from other producers, is the sum of the quantities shown by the meters

used in the purchase thereof, there having been no other measurement of said gas.

In connection with the business now being conducted by your orator, and which has been for a number of years last past
11 conducted by your orator and its predecessor above mentioned, in the production, transportation and sale of natural gas, your orator during the whole of the year 1918 and ever since, has owned, maintained and operated constantly the following named trunk pipe lines, used continuously and exclusively for the transportation and sale by your orator of said natural gas, namely:

(a) A pipe line extending from a group of wells owned and operated by your orator in the Counties of Roane and Kanawha, in the State of West Virginia, used for the transportation of the gas produced from said wells to and through the towns of Hurricane, Barboursville, Huntington, Ceredo and Kenova, in the State of West Virginia, and continuing to and through the towns of Catlettsburg and Ashland, in the State of Kentucky, and continuing thence to and across the Ohio River into the State of Ohio, where natural gas, during the whole of the year 1918 and ever since has been, distributed and sold by your orator to users thereof in the town of New Boston, in said State of Ohio, and also in said last mentioned State, near the City of Portsmouth, to the Portsmouth Gas Company, which latter Company sells such natural gas so transported, to persons desiring to purchase and use the same in said City of Portsmouth. The gas so transported through said pipe line was and is sold directly by your orator to consumers thereof at various localities in the State of West Virginia along the route of said line, and also was and is sold directly by your orator to the inhabitants of various localities in said State of Kentucky and State of Ohio. Branches of said line have been constructed by your orator which, during the whole of the year 1918 and ever since have been, constantly used by your orator in the transportation and sale of natural gas to persons (who purchase
12 and use the same) residing in the City of Ironton and the villages of Coal Grove, Chesapeake, Proctorville and other places in said State of Ohio.

(b) A pipe line leading from a group of wells owned and operated by your orator, located partly in Martin County, Kentucky, and partly in Mingo County, West Virginia, to and through the town of Louisa, in the County of Lawrence and State of Kentucky, thence crossing the Big Sandy River, to and through the town of Fort Gay, in the State of West Virginia, thence re-crossing said Big Sandy River into the State of Kentucky, and continuing thence through the County of Boyd in said State of Kentucky, to and across the said Big Sandy River into the State of West Virginia at a point near Kenova, and thence to a point where it is connected with the line first above mentioned. Said second mentioned line, during the year 1918 and since has been, used at times for the transportation and sale of natural gas by your orator from said group of wells located partly in Martin County, Kentucky, and partly in Mingo County, West Virginia, to the inhabitants of the town of Louisa, in Kentucky, the inhabitants of the town of Fort Gay, in West Virginia, and to the in-

habitants of various other towns and villages in each of said States, as well as for the supplying, in part, of the quantity of natural gas transported through the first mentioned line to the towns of Ashland and Catlettsburg, in Kentucky, and to Ironton, Coal Grove and other places in the State of Ohio, while at other times during the year 1918 and since the said line has been used for the transportation of natural gas in the opposite direction, and when so used, natural gas is transported and sold by your orator from wells located upon lands in the State of West Virginia to various localities (where said natural gas is used) in the State of Kentucky.

13 (c) A pipe line leading from a group of wells owned and operated by your orator, located upon lands in the Counties of Logan and Mingo, in the State of West Virginia, to and across the Big Sandy River at or near Kermit, West Virginia, and continuing thence to the town of Inez, Kentucky, at which last mentioned point your orator, during the whole of the year 1918 and ever since has, sold and delivered a part of the natural gas so transported through said line, to the Louisville Gas & Electric Company and the Central Kentucky Natural Gas Company, for transportation to and sale by said last mentioned Companies, respectively, in the Cities of Louisville and Lexington, in the State of Kentucky, while a part of the natural gas transported through said line was during said year and since sold directly by your orator to purchasers and users thereof in the towns of Kermit and Williamson and other localities in West Virginia, and to purchasers and users thereof in the towns of Warfield, Inez and other localities in the State of Kentucky.

(d) A pipe line leading from a group of wells owned and operated by your orator in the vicinity of East Lynne, Wayne County, West Virginia, to and across the Big Sandy River to Walbridge, in the State of Kentucky, which said pipe line during the whole of the year 1918 and ever since, has been used for the transportation of the natural gas produced from said wells in Wayne County, West Virginia, to said point in the State of Kentucky, where it is delivered into the pipe line described under "(b)" above.

(e) A pipe line leading from a group of wells owned and operated by your orator upon lands located in Roane and Jackson Counties, in the State of West Virginia, to and through the towns of Spencer and Sandyville to the town of Ravenswood on the Ohio River, in the State of West Virginia, with a branch line leading to the town of Ripley, in the County of Jackson, in the State of West

14 Virginia, which said line, during the whole of the year 1918 and ever since, has been used mainly for the transportation and delivery by your orator of natural gas to the Ohio Fuel Supply Company at a point near the Ohio River in the County of Jackson and State of West Virginia, at which point said natural gas was and is sold by your orator to the said Ohio Fuel Supply Company, and then transported, without interruption of its flow, by means of a connecting pipe line, across the Ohio River to various points in the State of Ohio, where the same was and is delivered and sold to purchasers and users thereof by said Ohio Fuel Supply Company; and

said last mentioned line was and is also used by your orator for the transportation of natural gas from said wells to purchasers and users thereof in said villages of Spencer, Sandyville, Ripley and Ravenswood in the State of West Virginia.

(f) A pipe line leading from a group of wells owned and operated by your orator in the Counties of Clay, Roane and Kanawha to a point near Ball's Gap, in the County of Cabell, in the State of West Virginia, used for the transportation of natural gas from said last mentioned wells to a measuring station located at Ball's Gap, in said Cabell County, where the same, during the whole year of 1918 and ever since, has been sold and delivered by your orator to Columbia Gas & Electric Company, by means of a connecting pipe line, through which it was and is transported, continuously and uninterruptedly, by said Columbus Gas & Electric Company to and across the Ohio River at Kenova, into the State of Kentucky, and thence through the State of Kentucky, again crossing said Ohio River, to and into the City of Cincinnati, in the State of Ohio, the same being used for the transportation of such natural gas to purchasers and users thereof in the Cities of Newport, Covington and Louisville, in the State of Kentucky, and in the City of Cincinnati, in the State of Ohio.

(g) A pipe line leading from a group of wells owned and operated by your orator in the Counties of Clay, Kanawha and Roane to Cedarville, in the County of Gilmer, in the State of West Virginia, at which last mentioned point your orator, during the whole of the year 1918 and ever since, has sold and delivered the natural gas transported thereby, by means of connecting pipe lines and without interruption of transit, to Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, by which two last mentioned Companies the transportation thereof was and is continued, by means of said connecting pipe lines, to and into the States of Pennsylvania and Ohio, in which last mentioned States it was and is sold to purchasers and users thereof by said Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, or companies affiliated with them, except possibly a comparatively small part of said gas is sold by said two companies for use along their lines in West Virginia.

Your orator files with this, its bill of complaint, as a part thereof, marked "Exhibit Map" a map showing the general location of the main trunk lines above referred to, and showing in a general way the natural gas fields from which the natural gas was and is produced and transported through said lines, but your orator is unable to state, with exactness, what quantity of the gas produced from wells located upon lands in the State of Kentucky and taken into your orator's pipe lines in said State of Kentucky, was and is transported out of said State into the States of West Virginia and Ohio, as distinguished from that part of said natural gas produced in Kentucky which was and is consumed within said State of Kentucky, although the amount thereof so transported out of the State of Kentucky is small as compared with the quantity thereof which is consumed within said State. Of the total quantity, how-

ever, above mentioned, of 53,629,791 M cubic feet, produced by your orator or by other producers and purchased by your orator in the State of West Virginia, approximately 42,000,000 M cubic feet was, during the year ending July 1, 1919, transported across the boundary line of the State of West Virginia into the States of Kentucky, Ohio and Pennsylvania, in some instances entirely through pipe lines owned and operated by your orator, and in other instances by means of connecting pipe lines of companies to whom your orator sells such natural gas, and in each instance where the gas is sold by your orator to Ohio Fuel Supply Company, Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, it is by said purchasing companies transported into States adjoining the State of West Virginia, by means of connecting and continuous pipe lines, without interruption of its flow, the same being measured while in transit without stopping or coming to rest for any purpose until it reaches the ultimate consumers and users thereof in the States of Kentucky, Ohio and Pennsylvania. The said gas so transported and sold by your orator to each of the four Companies above mentioned, is so transported and sold under contracts with said Companies, which in each case contemplated that the principal part of the gas sold was to be transported into States other than that in which it was produced, for sale and use in such other States, and each of said Companies, in the contract which it made with your orator for the purchase of said gas, bound itself to construct, and afterwards did construct, to the terminus of one or another of the main trunk lines hereinbefore mentioned as owned and operated by your orator, a connecting pipe line for the purpose of transporting by continuous pipe line to localities outside of the State of West Virginia, for sale and use in said localities outside the State of West Virginia, the

17 natural gas so sold by your orator to said purchasing companies respectively, except a comparatively small portion of such gas which it was contemplated would be sold and has been sold by each of said purchasing Companies along their lines in West Virginia.

Of the total quantity of gas produced and purchased by your orator in the States of West Virginia and Kentucky, for the year ending July 1, 1919, there was transported through pipe lines owned and operated by your orator and sold directly by your orator to the ultimate purchasers thereof 3,229,358 M cubic feet in the State of Ohio, 6,971,446 M cubic feet in the State of Kentucky, and 11,590,656 M cubic feet in the State of West Virginia, and all of such natural gas so sold directly by your orator in the State of Ohio was transported into said last mentioned State from the States of Kentucky and West Virginia, and of the natural gas so sold in the State of Kentucky during said year, more than one-half was produced in the State of West Virginia and transported hence to said State of Kentucky, and of the gas so sold in West Virginia, all, except a comparatively small part (the exact quantity of which is unascertainable), was produced in the said State of West Virginia.

VI.

Your orator now shows that at the Extraordinary Session of the Legislature of the State of West Virginia of the year 1919, a pretended statute was passed, signed and approved by the Governor of said State, to become effective on the 1st day of July, 1919, entitled.

“An act to levy a privilege tax on any person, firm or corporation engaged in the transportation of crude oil or petroleum, or the distillates thereof, or of natural gas, by means of pipe lines, 18 authorizing the state tax commissioner to provide rules and regulations for the collection of such tax, and defining the duties of the State tax commissioner.”

By Section 1 of said pretended statute it is provided that no person, firm or corporation, after the first day of July, one thousand nine hundred and nineteen, shall engage in or continue in the business of the transportation of natural gas, among other things, without the payment of an annual privilege tax thereby imposed for engaging in such business; providing, however, that the Act should not apply to any person, firm or corporation engaged in such business where the natural gas is by the entire system of such person, firm or corporation transported a distance of less than ten miles.

By Section 2 of said pretended statute it is provided that every person, firm or corporation engaged in said State in the transportation of natural gas or certain other commodities, by means of pipe lines, for sale to consumers within or without the State, or use within or without the State in the making of any products therefrom, shall pay to the State as an annual privilege tax for engaging in such business in the said State, one-third of one cent for each thousand cubic feet of such natural gas as is so transported or conveyed within said State, and contains a proviso in the following language: “Provided, that only one such tax, annually, shall be required to be so paid.”

Section 3 of said pretended statute requires that every person, firm or corporation liable for the tax imposed by the Act shall, within sixty days after the first day of July, 1919, and within sixty days after the first day of July in each year thereafter, deliver to the State Tax Commissioner a return in writing showing the quantity of natural gas transported or conveyed within the State during 19 the fiscal year ending on the first day of July next preceding.

The State Tax Commissioner is by said section authorized to prescribe forms for such return, and rules and regulations governing the ascertainment and assessment of the tax.

Section 4 of said pretended statute directs the State Tax Commissioner to ascertain and assess a tax upon the company making the return, which assessment is declared to be final and conclusive, unless appealed from in the manner provided.

Section 5 of said pretended statute provides for an appeal from the assessment made by the Tax Commissioner to the Board of Public Works of the State of West Virginia, within thirty days after notice of the assessment.

Section 6 of said pretended statute provides that no injunction shall be awarded by any court or judge to restrain the collection of all or any part of the tax imposed or assessed under the Act, except upon the ground that the assessment thereof was in violation of the Constitution of the United States or of the State of West Virginia, or that the assessment was fraudulent, or that there was a mistake in the amount of the tax assessed; and in case of mistake, it is provided that no such injunction shall be awarded, unless an application to correct the mistake is first made to the Board of Public Works and the application refused.

Section 7 of said pretended statute provides that every company so assessed with taxes shall pay the same into the State Treasury within sixty days after the date of the mailing of notice of the amount thereof, or within thirty days after notification of the amount thereof when ascertained and assessed by the Board of Public Works on appeal.

20 Section 8 of said pretended statute relates to a false or fraudulent return, and provides a penalty therefor.

Section 9 of said pretended statute provides that any company engaged or continuing to engage in the business for which such privilege tax is required, without having first secured a license, shall be liable to a fine of not less than one thousand dollars nor more than ten thousand dollars, although said pretended statute provides no method by which any such license can be obtained nor authorizes any official person or authority to issue the same.

A copy of said pretended statute is filed herewith as part hereof, marked Exhibit "A."

VII.

Your orator avers that sometime in the month of July, 1919 but not on or before the first day of July, the defendant Walter S. Hallanan, as State Tax Commissioner of West Virginia, prescribed and issued a form of return to be made by every person, firm or corporation engaged in the transportation of natural gas within the State by means of pipe lines, and, in connection therewith, prescribed and promulgated certain rules and regulations concerning the tax imposed by said pretended statute. A copy of said form of return and of said rules and regulations appended thereto, is filed herewith as part hereof, marked Exhibit "B."

In and by the said rules so adopted and promulgated by said defendant Hallanan, as such Tax Commissioner, it is prescribed that said tax is construed as being for the particular privilege of transporting or conveying oil or gas, or both, within the State of West Virginia, for sale to consumers within or without the State, or use by the reporting companies or others within or without the State, in

21 making any products derived therefrom, by means of pipe lines, owned, leased or operated, the aggregate length of which, including trunk, gathering and distributing lines, is ten miles or more, and that the tax, as applied to natural gas is one-third of one cent on each thousand cubic feet of natural gas transported by pipe line, regardless of whether or not it was so transported

a distance of ten miles or less, and regardless of whether or not more than one person or corporation has transported the same gas as parts of one journey; the effect of said regulations being that where the same natural gas has been transported by more than one company, each is assessed with the full tax thereon of one-third of one cent per thousand cubic feet, provided each of the companies so engaged in such transportation operates a system of pipe lines aggregating ten miles in length.

VIII.

Your orator charges that under the terms of said pretended statute as so construed and now attempted to be enforced by the defendant Hallanan, it would be required to report to the said defendant, on or before the 30th day of August, 1919, the entire quantity of natural gas transported by it, regardless of distance, during the year ending June 30, 1919, and to pay a tax at the rate of one-third of one cent per thousand cubic feet for all of the gas transported for any of the purposes mentioned in said Act, regardless of distance, during said year, for the privilege of continuing in such business on and after the first day of July, 1919, although said pretended statute does not purport on its face to become effective until the 29th day of June, 1919, nor to levy a tax upon the transportation for less than ten miles. Your orator now shows that all of the natural gas transported by it during said year ending July 1, 1919, was for the purposes hereinbefore set forth, that is to say, partly for sale to consumers of such gas, in some instances within, and, in some instances
22 without, the State of West Virginia, but the greater part of the entire quantity was transported by your orator for sale to other companies and not for sale directly by your orator to consumers of such gas, except that, in addition to the quantities, hereinbefore stated to have been transported by your orator, during said year it also transported, through its pipe lines, certain quantities used as fuel in operating its machinery, and certain other comparatively small quantities furnished free, without measurement, under the terms of leases held by your orator requiring such gas to be furnished free and, during said year, your orator also transported, by pipe line, 212,518 M cubic feet of natural gas for use in the manufacture of carbon black at a plant operated by your orator for that purpose near the village of Barren Creek, in Kanawha County, West Virginia, but no part of the gas transported for the said last mentioned purpose was so transported a distance of more than five miles, and the aggregate length of the pipe lines used in its transportation has been, at all times, less than ten miles. With the exception above stated, no part of the natural gas transported by your orator during said year ending July 1, 1919, or since, was transported for use in the making of any products derived from such gas, within the meaning of said statute.

IX.

Your orator avers that it has for a number of years supplied and is still supplying, substantially all of the inhabitants of the City of

Ironton and the towns of Chesapeake and Proctorville, in the State of Ohio, with natural gas for fuel in their residences, at a rate or price fixed by the ordinances of said respective municipalities, which rates or prices so fixed were accepted by your orator for a period of ten years from the dates thereof, respectively, which said ten year period, in the case of Ironton, expires on the 19th day of November, 23 1919, in the case of Chesapeake on the 7th day of August, 1924, and in the case of Proctorville on the 4th day of August, 1924, and that said ordinances, together with the acceptance thereof by your orator, constitute binding contracts governing said rate for the periods therein provided, respectively, under the statute law of the State of Ohio. That the gas sold by your orator to the Ohio Fuel Supply Company, Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, as above referred to, is, in each instance, so supplied by virtue of a contract with such purchasing company, at a fixed price per thousand cubic feet for all of the natural gas so sold to each of said Companies; that all of said contracts were in existence long before the passage of said pretended statute levying said privilege tax upon the transportation of natural gas by pipe line in the State of West Virginia, and each of them covers a period of a number of years yet to come; that in and by each of said contracts with the four Companies above mentioned, it was contemplated and intended by the parties thereto, and your orator bound itself, to transport, by means of pipe lines in the State of West Virginia, large quantities of natural gas for transportation by each of said purchasing Companies to localities in other States, there to be used and consumed, by means of continuous pipe lines from points where such natural gas was produced, and the said gas heretofore delivered and sold by your orator to said four several Companies, and which is now being so delivered and sold and will in the future be so delivered and sold, has been, is and will be transported mainly for sale and use at places outside the State of West Virginia and in other States of the United States, in commerce between such other States and the State of West Virginia. In the year ending July 1, 1919, your orator transported and delivered, for such interstate purposes, to the Ohio Fuel Supply Company 10,283,019 M cubic feet, to the Columbia Gas & Electric Company 7,567,353 M cubic feet, to the Hope Natural Gas Company 7,961,333 M cubic feet, and to Pittsburgh & West Virginia Gas Company 7,270,429 M cubic feet of natural gas. In addition to the business conducted by your orator in interstate transportation of natural gas above referred to in this paragraph, your orator further shows that it is now, and has been for several years last past, and proposes to be in the future, engaged in the transportation of natural gas, by means of pipe lines, from the State of West Virginia into the States of Kentucky and Ohio, entirely by means of lines owned, controlled and operated by itself in fulfillment of the following existing contracts between your orator and other gas companies which your orator has agreed to supply, namely:

(a) A certain contract bearing date the 25th day of October, 1915, by which your orator agreed with Portsmouth Gas Company, a corpo-

ration of Ohio, to furnish and deliver to the said Portsmouth Gas Company, at a point near the eastern limit of the City of Portsmouth, in the State of Ohio, all the natural gas which said Portsmouth Gas Company might sell or distribute to its class of consumers commonly classified as domestic consumers in the corporate limits of said City of Portsmouth, for a term of ten years commencing on the 1st day of January, 1916, subject to such limitations as were specified in said contract relating to the depletion of the supply of natural gas controlled by your orator and the previous obligations undertaken by it to supply gas to others. The said Portsmouth Gas Company supplies substantially all the inhabitants of the City of Portsmouth with natural gas for fuel and light in their dwelling houses, and the quantity of gas furnished by your orator for the purposes of this contract in the year ending July 1, 1919, was 1,598,980 M cubic feet, and your orator is supplying the said Portsmouth Gas Company at approximately the same rate per annum at the present time.

25 The said contract also imposes a limited obligation upon your orator to supply natural gas to said Portsmouth Gas Company for the use of manufacturing enterprises which may desire to purchase the same from said Portsmouth Gas Company, and the price at which all of the natural gas furnished by your orator to the Portsmouth Gas Company in fulfillment of said contract is therein fixed for each year during which it is to remain in force. The natural gas so furnished to said Portsmouth Gas Company has been, and will necessarily continue to be, transported chiefly from the wells owned and operated by your orator in the State of West Virginia, by means of the pipe line first mentioned in paragraph V of this bill, supplemented to some extent by the gas from the wells owned and operated by your orator in Kentucky and transported through the second mentioned line in said Paragraph V.

(b) A certain contract bearing date the 1st day of November, 1912, by which your orator agreed to deliver and sell to Central Kentucky Gas Company, a corporation of Kentucky, at a point near the village of Inez, in the County of Martin and State of Kentucky, such quantities of natural gas (but not less than 720 million cubic feet annually) as might be required by the said Central Kentucky Natural Gas Company for the supply of its customers in the City of Lexington and other localities in said State of Kentucky, for and during a period of twenty years after the date of said contract, and so long thereafter as your orator produces natural gas in marketable quantities, subject, however, to certain limitations expressed therein with reference to previous contracts of your orator to supply natural gas to others. In and by said contract your orator obligated itself to transport large quantities of natural gas, by means of pipe lines, from the wells owned and operated by it in West Virginia to said delivery point, near the town of Inez, in the State of Kentucky, and during the year ending July 1, 1919, you- orator did deliver to said Central Kentucky Natural Gas Company, in pursuance of said contract, 1,534,484 M cubic feet of natural gas, of which quantity at least one-half was transported from said wells in the State of West Virginia, by means of pipe

lines, to and into the said State of Kentucky, and your orator is continuing at this time to deliver to said Central Kentucky Natural Gas Company natural gas at approximately the same rate per annum, at least one-half of which is transported from the State of West Virginia, and the remainder from the wells operated by your orator or by persons from whom it purchases natural gas, in the State of Kentucky. The gas so transported from the State of West Virginia for the purposes of said contract is so transported by means of the pipe lines described under the headings "(a)", "(b)", "(c)" "(d)" of Paragraph V. of this bill of complaint.

(c) A certain contract bearing date the 5th day of July, 1913, by the terms of which your orator agreed to sell and deliver to Louisville Gas & Electric Company, at a point near the village of Inez, in the County of Martin and State of Kentucky, natural gas to the extent requisite for the supply of the consumers upon the distributing systems in and about the City of Louisville, in the State of Kentucky, owned by said Louisville Gas & Electric Company, to the extent of the capacity of the twelve inch line constructed by said Louisville Gas & Electric Company from Inez to the City of Louisville, limited, however, to the available supply of your orator after the performance of previous obligations incurred by it for the supplying of natural gas to others. By the terms of said contract it is stipulated that the same shall remain in force for a period of twenty years from and after July 5, 1913, with certain provisions for a renewal upon the expiration of said period. In and by said last

mentioned contract your orator obligated itself to transport,
27 by means of pipe lines, large quantities of natural gas from wells owned and operated by it in the State of West Virginia to said point of delivery in the State of Kentucky, and during the year ending July 1, 1919, your orator delivered to said Louisville Gas & Electric Company, in fulfillment of the terms of said contract, 2,716,919 M cubic feet of natural gas, more than one-half of which was transported, by means of pipe lines, from the wells operated by your orator in the State of West Virginia, and your orator is continuing at the present time to deliver natural gas to said Louisville Gas & Electric Company at approximately the same rate per annum, at least fifty per cent. of which is transported by means of pipe lines, from wells in the State of West Virginia to said delivery point in the State of Kentucky, the remainder being produced from wells operated by your orator, or by persons from whom it purchases natural gas, located in the State of Kentucky, and there is not available from the wells owned by your orator and by persons from whom it has contracts to purchase natural gas in the State of Kentucky, a sufficient quantity of natural gas for the purpose of complying with the terms of said contracts with the Louisville Gas & Electric Company and the Central Kentucky Natural Gas Company, so that in order to fulfill the terms of said contracts your orator is obligated to continue to transport gas from wells located in the State of West Virginia.

Your orator also avers that it and its predecessor hereinbefore referred to have from time to time, during the past ten years, made

numerous contracts for the purchase of natural gas with the owners of various gas-producing wells located upon lands in the State of West Virginia, and with the owners of a comparatively few wells in the State of Kentucky, by the terms of which several contracts your orator is obligated, for periods of many years in the future, to accept and take into its pipe lines in the State of West Virginia the natural gas produced by the owners of such wells, and the greater part of the natural gas purchased and taken into such pipe lines is by your orator transported therein to points outside the State of West Virginia, or delivered by your orator to some one or more of the companies aforesaid to whom it sells natural gas for transportation by said latter companies to points outside the State of West Virginia, and by the terms of all such contracts your orator is obligated to pay to the persons from whom it purchases such natural gas a fixed rate or price throughout the terms of said respective contracts.

X.

Your orator avers that the entire system of pipe lines operated by it for the transportation of natural gas greatly exceeds a distance of ten miles in length, and that more than seventy-five per centum of all the natural gas transported by it through its pipe lines is so transported a distance of more than ten miles, although it transports a certain quantity of natural gas each year a distance of less than ten miles, the exact amount of which natural gas so transported a distance of less than ten miles is not known to your orator and is incapable of definite ascertainment, inasmuch as there is a pipe line extending to each of the natural gas wells operated by your orator from which it purchases gas, in addition to numerous gathering lines through which such natural gas is assembled and brought into connection with one or more of the trunk lines referred to in Paragraph V of this bill of complaint.

XI.

Your orator avers that it has complied with the laws of the State of West Virginia and has authority to conduct its business therein under and by virtue of its certificate of incorporation; that it has large and valuable property located in said State, consisting chiefly of the lands, leasehold estates, wells, pipe lines and equipment hereinbefore referred to; that its said property located in the State of West Virginia was assessed for taxation by the Board of Public Works of said State for the year 1918, in the sum of \$15,000,000.00; that it has paid all the lawful and regular taxes imposed by the State of West Virginia and its political subdivisions, upon its property located in said State, amounting in the year 1918 to the sum of \$208,355.27; that it has also paid each year a tax imposed by the laws of said State, denominated a license tax upon its charter as a corporation, which tax so paid for the year 1918 was the sum of \$1,690.00; that it has also paid each year, since

the enactment of the statute levying the same, a special excise tax to the said State of West Virginia for the privilege of conducting its business as a corporation in said State, which tax for the year 1918, at the rate of three-fourths of one per cent. of its net income from sources in West Virginia, amounted to the sum of \$17,675.17; and that it has also paid each year, since the enactment of the statute levying the same, a tax designated as its proportion of the expense of operating the Public Service Commission of the State of West Virginia, which tax was levied in pursuance of a statute of said State on all public service corporations subject to the control of said Public Service Commission, and which amounted for the year 1918 to the sum of \$2,700.00.

XII.

Your orator avers that there are numerous persons, firms and corporations in the State of West Virginia engaged in the production and transportation of natural gas by means of pipe lines, who transport all of the natural gas so produced by them a distance of less than ten miles by the entire system of lines owned, controlled or operated by such persons, firms and corporations and that
30 there are a large number of persons, firms and corporations engaged in the production and transportation of natural gas by means of pipe lines in the State of West Virginia, whose entire system of pipe lines covers a distance of less than ten miles, and that by the express terms of said pretended statute herein complained of, your orator and other corporations similarly situated, who transport natural gas a distance of more than ten miles, are discriminated against, contrary to Section 1 of Article X of the Constitution of the State of West Virginia. Your orator is informed and believes, and upon such information and belief charges the fact to be, that there were during the year 1918 and ever since, more than six hundred persons, firms and corporations engaged in the production and transportation of natural gas by pipe lines in West Virginia, no one of which transports such gas as much as ten miles or operates a system of pipe lines as much as ten miles in length, and that the combined quantities of natural gas so produced and transported by said persons, firms and corporations is equal to more than one-fourth of all the natural gas produced in said State.

XIII.

Your orator now charges that the said Act of the Legislature of West Virginia, passed at its Extraordinary Session of the year 1919, known as Chapter V in the records of said session, in so far as it attempts to levy a tax upon the privilege of transporting natural gas by means of pipe lines, is a direct and immediate burden upon the commerce between the States of the United States, in which your orator is engaged as hereinbefore particularly set forth, and that it impairs the obligations of valid contracts to which your orator is a party, and that the said statute is unconstitutional and void; that the

necessary effect of the enforcement of said statute would be to deprive your orator of its property without due process of law, contrary
31 to the Fourteenth Amendment and other provisions of the Constitution of the United States, and to Section 10 of Article III of the Constitution of West Virginia; to deprive your orator of its property without compensation, contrary to the Fifth Amendment and other provisions of the Constitution of the United States, and to Section 9 of Article III of the Constitution of West Virginia; to deny to your orator the equal protection of the laws, and to abridge the privileges and immunities of your orator, contrary to the Fourteenth Amendment and other provisions of the Constitution of the United States, and to Section 1 of Article X of the Constitution of West Virginia, in that it is an attempt to tax the privileges and franchises of certain persons and corporations by a law which is not uniform and equal; to impair the obligations of contracts to which your orator is a party, contrary to Section 10 of Article I of the Constitution of the United States, and of Section 4 of Article III of the Constitution of the State of West Virginia; and in the enforcement of said statute against your orator and others similarly situated will necessarily regulate, restrict and, to a great extent, prohibit commerce between the States of the character conducted by your orator, in that it will exact from your orator for the privilege of conducting its business between the States a tax amounting to more than \$100,000.00 annually.

Your orator further charges that said pretended statute is null and void because of the indefinite and uncertain terms in which said tax is attempted to be levied, in that it requires the payment of a tax at the rate of one-third of one cent for each thousand cubic feet of natural gas transported by pipe line without any specification of the pressure at which such tax shall be computed; that natural gas, in the ordinary course of business and in order that it may be marketed, is necessarily transported at pressures varying from above four hundred (400) pounds to less than four (4) ounces to the square inch;

32 that natural gas has the quality of expanding almost definitely, and the term "one thousand cubic feet" is practically meaningless without specification of the pressure; that it would be a physical impossibility for your orator to ascertain, with even approximate correctness, all of the various pressures to which the natural gas transported by it is subjected from the time it leaves the point of production until the time it arrives at the point of consumption.

Your orator further charges that said pretended statute is unconstitutional, null and void in so far as by Section 3 and other sections your orator and others similarly situated are required, within sixty days after the 1st day of July, 1919, and within sixty days after the 1st day of July in each year thereafter, to report to the State Tax Commissioner, in the manner therein-provided, or in the manner provided by the rules and regulations promulgated by the defendant Hallanan and heretofore exhibited with this bill. The said return is required merely for the purpose of providing a means for the
assessment of said unconstitutional tax, and for no other purpose.

For the reasons hereinbefore set forth, your orator is unable to comply with the terms of said statute or the regulations promulgated by the defendant Tax Commissioner, and is particularly unable to report the quantity of gas transported by it by pipe line during the year ending July 1, 1919, for the reason that large quantities of natural gas were so transported by your orator during said year without measurement and at varying pressures, previous to the enactment of said statute.

XIV.

Your orator further charges that the interruption of the business in which it is engaged would result in great public inconvenience, loss and suffering; that many cities and towns in the States of Ohio, Kentucky and West Virginia are largely dependent upon the natural gas transported by your orator, by means of its pipe lines, 33 for fuel and light in the homes of their inhabitants; that many of the residences in such communities are not equipped for the use of any other fuel, many being without chimneys for the burning of coal; that said pretended statute purports to render your orator subject to a fine of not less than one thousand dollars nor more than ten thousand dollars for continuing in its business after the 1st day of July, 1919, without having first secured a license, although no officer of the State of West Virginia, or other person, is authorized or empowered to grant or issue such license; that even though any person or authority were empowered to grant such license, it cannot by the terms of said pretended statute be obtained without the previous payment by your orator of a large sum of money for the privilege of engaging in a business in which it has the lawful right to engage without making such payment.

Your orator further avers that the defendant Walter S. Hallanan, as State Tax Commissioner, claims that the business heretofore and now being conducted by your orator, as hereinbefore set forth, is within the terms of the statute aforesaid purporting to levy a tax upon the privilege of transporting natural gas by means of pipe lines, and said defendant, as such Tax Commissioner, claims that your orator must comply with all of the terms of said pretended statute, and must, before August 30, 1919, deliver to him a return in writing showing the quantity of natural gas produced both inside and outside the State of West Virginia and transported by your orator, by means of pipe lines, within the State of West Virginia, during the fiscal year ending on July 1, 1919, such return to be signed and sworn to as provided by said Act and in the form prescribed by said defendant. That said defendant is demanding of your orator that it file said return in the manner aforesaid, in order that he may, and he intends promptly thereafter, to ascertain and assess against your orator a tax of one-third of one cent per thousand cubic feet 34 for all the natural gas so transported by your orator within the State of West Virginia during the fiscal year ending on July 1, 1919, whether such natural gas was so transported by your orator for sale to customers within or without the State of West Virginia, or use within or without said State in the making of any

products derived therefrom, and after such ascertainment and assessment of such tax, said defendant Hallanan, as such Tax Commissioner, intends to collect the amount so assessed by him from your orator by judicial proceedings, and intends to collect from your orator a penalty of ten per cent of the total amount of such assessment, in addition to the amount of such assessment, if said tax so assessed by him is not voluntarily paid by your orator within the time provided by said statute for the payment thereof. Your orator further avers that, in the event it fails or omits to file said return or fails to pay the tax which said State Tax Commissioner assesses against your orator under said statute in accordance with the express terms thereof, it is the intention and purpose of said State Tax Commissioner, and he will unless restrained by order herein, undertake to collect from your orator the amount of tax so assessed by him, and in addition, a ten per cent penalty as provided by said statute, by appropriate judicial proceedings and by the enforcement of the fine or fines prescribed by said statute, and it is the intention and purpose of the defendant E. T. England, as Attorney General of said State, and it is by law made part of his duty, to represent and assist said State Tax Commissioner in all judicial proceedings instituted for the enforcement of said Act against your orator and in the attempted collection of said tax and said penalties, and in the imposition of the fine or fines therein prescribed for alleged violations thereof by your orator.

Your orator further shows that said pretended statute so passed by the said Extraordinary Session of the Legislature of West Virginia of the year 1919, constitutes a cloud upon the property and business and franchises of your orator, and the enforcement thereof
35 against it will require your orator to defend a multiplicity of suits and judicial proceedings instituted from year to year by said Tax Commissioner to collect the tax and penalties provided in said statute, and your orator will be required to defend numerous proceedings instituted by said Tax Commissioner and said Attorney General, seeking to have it held liable for the fines therein prescribed, and any judgment or decree obtained against your orator for said tax or penalties or any fine imposed upon it, will constitute and become liens upon your orator's said property, all to its great injury.

XV.

Your orator further shows that at the time of the passage by the Legislature of the State of West Virginia of the said statute imposing said privilege tax herein complained of, and for a number of years previous thereto, more than one half of all natural gas produced in the State of West Virginia was being and had been during each of said years, transported by means of pipe lines to places outside of the State of West Virginia and in other States of the United States, for sale to consumers thereof in such other States, and it was the intention of the Legislature in enacting said statute that the tax therein provided should be assessed upon all the natural gas transported by means of pipe lines for sale to the consumers thereof,

whether within or without the State, or use within or without the State in the making of any products derived therefrom; that the Legislature intended by said statute that the greater part of said tax should be assessed upon the privilege of transporting natural gas from the State of West Virginia into other States of the United States, and that less than one-half of said tax should be assessed upon the privilege of transporting such gas between different points within the State of West Virginia.

36 Wherefore, your orator being without remedy in the courts of common law, prays that a restraining order may be entered, inhibiting the defendant Walter S. Hallanan, as State Tax Commissioner of West Virginia, from enforcing the said pretended statute, or any of the terms thereof, against your orator, until the further order of this court; that the said defendant Hallanan and the defendant E. T. England, as Attorney General of the State of West Virginia, and all persons acting under the direction or control of them or either of them, be inhibited, enjoined and restrained, until the further order of this court, from enforcing or attempting to enforce any of the provisions of said pretended statute, and particularly those provisions requiring your orator to make a return or report in writing to the State Tax Commissioner of the natural gas transported by it by means of pipe lines in the State of West Virginia, provisions requiring the payment by your orator of a tax of one-third of one cent per thousand cubic feet for the natural gas so transported, or any other tax on the privilege of transporting such gas, and the provision imposing fines and penalties upon your orator for continuing in the conduct of its business without securing the license mentioned in said pretended statute, and that upon final hearing such injunction may be perpetuated; that the said pretended statute purporting to impose the said tax upon the privilege of transporting natural gas by pipe line be adjudged and decreed null and void as to your orator and the business in which it is engaged as hereinbefore set out; and for such other and further relief as to equity appertains and this cause requires. And as in duty bound your orator will ever pray.

UNITED FUEL GAS COMPANY,
By COUNSEL.

BROWN, JACKSON & KNIGHT,
R. G. ALTIZER,
Counsel for Plaintiff.

37 STATE OF WEST VIRGINIA,
County of Kanawha, to-wit:

L. A. Seyffert, being first duly sworn, deposes and says that he is Secretary and Treasurer of United Fuel Gas Company, the plaintiff named in the foregoing bill of complaint, and that the facts and allegations contained in said bill of complaint are true, except such facts and allegations as are therein stated to be upon information and belief, and as to such allegations as are therein

stated to be upon information and belief, he believes them to be true.

L. A. SEYFFERT.

Taken, sworn to and subscribed before me this 26th day of August, 1919.

E. A. CARNEY,
Notary Public.

My commission expires April 23rd, 1927.

Endorsed on back: (3.) United Fuel Gas Company, Plaintiff,
vs. Walter S. Hallanan, as State Tax Commissioner of West Vir-
ginia et al., Defendants. In Equity. Bill of Complaint.
38 Filed by order Court Aug. 26, 1919. In Kanawha Circuit
Court. Clerk's Office. A. P. Hudson, Clerk.

To Walter S. Hallanan, as State Tax Commissioner of the State of
West Virginia, and E. T. England, at Attorney General of said
State:

You are hereby notified that the undersigned, United Fuel Gas
Company, a corporation, will, on Tuesday, the 26th day of August,
1919, at eleven (11) o'clock A. M. of said day, or as soon there-
after as counsel may be heard, move the Circuit Court of Kanawha
County, West Virginia, for a temporary injunction inhibiting and
restraining you, the said Walter S. Hallanan, as such State Tax
Commissioner, and all persons acting under your authority or
control, from enforcing or attempting to enforce in any manner,
that certain Act of the Legislature of West Virginia, Chapter V
(House Bill No. 3), Extraordinary Session for the year 1919, or
any part of said Act, against the undersigned, and from requiring
the undersigned to make any return or report to you, as such State
Tax Commissioner, of the amount of natural gas transported by
the undersigned during the year ending July 1, 1919, and from
assessing upon or against the undersigned any tax under said
Act, and from collecting or attempting to collect from the under-
signed, in any manner, any tax under the provisions of said Act,
or any penalty or fine therein prescribed; and inhibiting and re-
straining you, the said E. T. England, as such Attorney General,
and all persons acting under your authority, advice or direction,
from enforcing or attempting to enforce any and every part of
said Act against the undersigned.

39 The said motion for said injunction order will be based
upon the bill of complaint of the undersigned, duly verified.
to be filed at the time and place aforesaid.

Very respectfully,

UNITED FUEL GAS COMPANY,
By BROWN, JACKSON & KNIGHT,
R. G. ALTIZER,
Its Counsel.

Endorsed on back: (4.) United Fuel Gas Company, Plaintiff, vs. Walter S. Hallanan, as State Tax Commissioner, et al., Defendants. In Chancery. Notice.

Executed the within process on the within named Walter S. Hallanan and E. T. England on the 25 day of Aug., 1919, by delivering to him in person a true copy thereof in Kanawha County, West Virginia.

S. B. JARRETT,
S. K. C.,

By J. L. CARNEY,
D. S. K. C.

40 Original in the ——. Takes effect — passage.

_____,
Clerk of the House of Delegates.

_____,
Clerk.

Correctly enrolled:

_____,
Chairman House Committee.

_____,
Chairman Senate Committee.

Extraordinary Session.

Enrolled Bill.

(Senate Substitute for H. B. No. 3.)

An Act to levy a privilege tax on any person, firm or corporation engaged in the transportation of crude oil or petroleum, or the distillates thereof, or of natural gas, by means of pipe lines, authorizing the state tax commissioner to provide rules and regulations for the collection of such tax, and defining the duties of the state tax commissioner hereunder.

Be it enacted by the Legislature of West Virginia:

Section 1. No person, firm or corporation, hereinafter (2) called company, after the first day of July, one thousand nine hundred (3) and nineteen, shall engage in or continue in the business of the (4) transportation of crude oil or petroleum, or the distillates thereof, (5) or of natural gas, by means of pipe lines, without the payment of (6) an annual privilege tax hereby imposed for engaging in such busi- (7) ness; provided, however, that nothing contained in this act shall (8) apply to any person, firm or corporation engaged in the business (9) aforesaid where the crude oil, petroleum or distillates thereof, or (10) natural gas, is by the entire system of such person, firm or cor- (11) poration, transported a distance of less than ten miles.

41 Sec. 2. Every person, firm and corporation engaged in this (2) state in the transportation of either crude oil or petroleum, or the (3) products and distillates thereof, or of natural gas, or both, by (4) means of pipe lines for sale to consumers within or without the (5) state, or use within or without the state in the making of any (6) products derived therefrom, shall pay to the state, as an annual (7) privilege tax for engaging in such business in the state, two cents (8) for each barrel of crude oil or petroleum, or the distillates thereof, (9) and one-third of one cent for each thousand cubic feet of such (10) natural gas as is so transported or conveyed within this state. Pro- (11) vided, that only one such tax, annually, shall be required to be so (12) paid.

Sec. 3. Every person, firm or corporation liable to tax im- (2) posed by this act, shall, within sixty days after the first day of (3) July, one thousand nine hundred and nineteen, and within sixty (4) days after the first day of July in each year thereafter, deliver to (5) the state tax commissioner a return in writing showing the quan- (6) tity of crude oil or petroleum, or the distillates thereof, or of natu- (7) ral gas transported or conveyed within the state during the fiscal (8) year ending on the first day of July next preceding. Such return (9) shall be signed and sworn to by the person making the same for (10) himself or a partnership, and by the president, vice-president or (11) other principal accounting officer making the same for a corpora- (12) tion, which return shall be in the form prescribed by the state tax (13) commissioner. The state tax commissioner is hereby invested with (14) full power and authority and it is hereby made his duty to pre- (15) scribe forms for returns and assessments and to make, issue and (16) put in force all necessary and needful rules and regulations for (17) ascertaining and assessing the tax hereby imposed upon every (18) company.

42 Sec. 4. The state tax commissioner shall ascertain and assess (2) the tax upon the company making a return, and shall notify it of (3) the amount of such tax by notice deposited in the postoffice ad- (4) dressed to such company at its principal office or place of business. (5) Such ascertainment of the tax shall be final and conclusive, unless (6) the same be appealed from in the manner following, within thirty (7) days after such notice is so deposited. If any company fail or (8) refuse to make return, the state tax commissioner shall proceed, in (9) such manner as may be proper, to obtain the facts and information (10) required to be furnished by such return; and to this end he may, (11) by himself or his duly appointed agent, make examination of the (12) books, records and papers of any such company, and may take the (13) evidence, on oath, of any person who he may believe shall be in (14) possession of facts or information pertinent to the subject of in- (15) quiry, which oath he or the agent so appointed by him may admin- (16) ister. As soon as possible after procuring such information as he (17) may be able to do with respect to any company failing or refusing (18) to make a return, the state tax commissioner shall proceed to as- (19) certain and assess the tax upon such company, and

shall notify it (20) of the amount thereof as hereinbefore provided. And his act shall (21) be final as to any company which refused to make a return.

Sec. 5. If any such company, making a return as provided (2) by this act, feels aggrieved by the assessment so made upon it for (3) any year by the state tax commissioner, it may apply to the board (4) of public works by petition in writing, within thirty days after (5) the notice is deposited as provided in the preceding section, for (6) a hearing and a correction of the amount of the tax so assessed (7) upon it by the state tax commissioner, in which petition
43 shall be (8) set forth the reasons why such hearing should be granted and the (9) amount such tax should be reduced. The board shall promptly (10) consider such petition, and may grant such hearing or deny the (11) same. If denied, the petitioner shall be forthwith notified thereof; (12) if granted, the board shall notify the petitioner of the time and (13) place fixed for such hearing. After such hearing the board may (14) make such order in the matter as may appear to them just and (15) lawful and shall furnish a copy of such order to the petitioner.

Sec. 6. No injunction shall be awarded by any court or judge (2) to restrain the collection of all or any part of the taxes imposed (3) and assessed under this act, except upon the ground that the as- (4) sessment thereof was in violation of the constitution of the United (5) States, or of this state; or, that the same were fraudulently as (6) sessed; or that there was a mistake made in the amount of taxes (7) assessed; and in case of mistake no such injunction shall be (8) awarded, unless application shall be first made to the board of (9) public works to correct the alleged mistake, and the board shall (10) refuse to do so, which fact shall be stated in the bill, or unless the (11) complainant pay into the treasury of the state all taxes appearing (12) by the bill of complaint to be owing.

Sec. 7. Every company so assessed with taxes shall pay the (2) same into the state treasury within sixty days after the date of (3) the mailing of the notice of the amount thereof, or within thirty (4) days after notification of the amount thereof, when ascertained (5) and assessed by the board of public works on appeal. All taxes (6) assessed under provisions of this act against any such company (7) shall constitute a debt to the state, and may be collected by action (8) of assumpsit or appropriate judicial proceeding, which remedy (9) shall be in addition to all other existing remedies for the collec- (10) tion of taxes. It shall be the duty of the
44 state tax commissioner (11) to proceed to collect such taxes with a penalty of ten per centum (12) added thereto, if not paid when due. At the time of paying the (13) taxes the state tax commissioner shall issue to the company paying (14) the same a certificate of payment for the proper fiscal year.

Sec. 8. Any person required or authorized by law to make, (2) sign or verify any return by this act, who makes any false or (3) fraudulent return or statement with intent to defraud the state, (4)

or defeat or evade the payment of the tax, or any part thereof (5) imposed by his act, shall be guilty of a misdemeanor, and upon (6) conviction thereof, shall be fined not less than one hundred dollars, (7) nor more than five thousand dollars, to which fine shall be added (8) the costs of prosecution.

Sec. 9. Any company engaging or continuing in the business (2) aforesaid without having first secured a license, as hereinbefore (3) provided, shall be liable to a fine of not less than one thousand (4) dollars nor more than ten thousand dollars.

Sec. 10. All acts and parts of acts inconsistent herewith (2) are hereby repealed.

_____,
Speaker of the House of Delegates.

_____,
Clerk of the House of Delegates.

_____,
President of the Senate.

_____,
Clerk of the Senate.

The within is — this — day of — —, 1919.

_____,
Governor.

_____,
Speaker of the House of Delegates.

_____,
Clerk of the House of Delegates.

_____,
President of the Senate.

_____,
Clerk of the Senate.

The within is — this — day of — —, 1919.

_____,
Governor.

In Chancery.

UNITED FUEL GAS COMPANY, Plaintiff,

vs.

WALTER S. HALLANAN as State Tax Comr., &c., et al., Defendants.

EXHIBIT "A" FILED WITH THE BILL OF COMPLAINT IN THE ABOVE-
STYLED CAUSE.

Filed Aug. 26, 1919, in Kanawha Circuit Court Clerk's Office.

A. P. HUDSON,
Clerk.

(6) United Fuel Gas Company, Plaintiff, vs. Walter S. Hallanan,
as State Tax Comr., &c., et al., Defendants. In Chancery.

EXHIBIT "B" FILED WITH THE BILL OF COMPLAINT IN THE ABOVE-
STYLED CAUSE.

46 Filed Aug. 26, 1919, in Kanawha Circuit Court Clerk's
Office.

A. P. HUDSON,
Clerk.

(Here follows Tax Return, marked pages 46a and 46b.)

THIS RETURN IS TO BE FORWARDED TO THE STATE TAX COMMISSIONER, CHARLESTON, WEST VIRGINIA.

FORM 200—TAX COM.
(JULY, 1919)

FOR USE OF BUREAU ONLY

Return received.....
Number.....
Verified by.....
Assessed by.....

STATE OF WEST VIRGINIA
Pipe Line Privilege Tax Return

(REQUIRED BY CHAPTER 5, ACTS OF THE LEGISLATURE OF 1919, EXTRA SESSION)

THIS RETURN MUST BE IN THE HANDS OF THE STATE
TAX COMMISSIONER, CHARLESTON, WEST VIRGINIA,
ON OR BEFORE AUGUST 30, 1919.

FOR USE OF BUREAU ONLY

Amount of tax assessed \$.....
For year ended.....
Journal page.....
Company notified.....

RETURN FOR FISCAL YEAR JULY 1, 1918—JULY 1, 1919.

By....., whose principal office or place of
(Name of person, firm or corporation)
business is at.....
(Street and Number) (City or Town) (State)
and the place at which are kept the books of account, papers and other data from which this return is prepared is.....
(City or Town)
(State)

Section 4 of the law provides that "the state tax commissioner shall ascertain and assess the tax upon the company making a return, and shall notify it of the amount of such tax by notice deposited in the postoffice addressed to such company at its principal office or place of business."

Give below the exact address to which official notices of assessment, if any, should be forwarded: (Give city, etc, but not company's name)

There should appear in each blank space provided for information SOME NOTATION to indicate that the information desired has not been overlooked. The word "NONE" may be used where that word expresses the FACTS. Where sufficient space is not provided for the entry of the information required, lists containing full information in the form indicated should be marked in accordance with the particular item and attached hereto; when so attached they become parts of this return.

IMPORTANT—Read this form and all instructions carefully and fill in supplementary statement before making entries in return proper. Totals in supplementary statement should agree with totals in return.

1. The word "company", as used in this blank, is understood to include any person, firm, partnership, corporation, joint-stock company or association liable for the privilege tax in connection with which the information requested below is required.

2. The word "transported" and the words "transported or conveyed" are understood as having reference to oil, gas, etc., transported within the State of West Virginia, by means of pipe lines, for sale to consumers within or without the state, or use by the reporting company or others within or without the state in the making of any products derived therefrom.

3. Total mileage of all pipe lines owned, leased or operated by the reporting company, including trunk, gathering and distributing lines, IN ALL STATES, Miles.
Total mileage of all pipe lines owned, leased or operated by the reporting company, including trunk, gathering and distributing lines, IN WEST VIRGINIA, Miles,
of which, miles were used in the transportation of oil, gas, etc., during the year for which return is made.

QUANTITIES TRANSPORTED WITHIN WEST VIRGINIA BY MEANS OF PIPE LINES, AND AMOUNT OF TAX MEASURED THEREBY.

	Quantity	Rate	Amount of Tax	
			Dollars	Cents
4. Total quantity of crude oil or petroleum transported or conveyed within West Virginia.....	Bbls.	2 cts. per barrel	\$.....	.....
5. Total quantity of the products and distillates of crude oil or petroleum transported or conveyed within West Virginia.....	Bbls.	2 cts. per barrel	\$.....	.....
6. Total quantity of natural gas transported or conveyed within West Virginia.....	M. Cu. Ft.	1/2 of 1c. per M. cu. ft.	\$.....	.....

SUPPLEMENTARY STATEMENT

4. CRUDE OIL OR PETROLEUM TRANSPORTED WITHIN WEST VIRGINIA BY MEANS OF PIPE LINES.

(a) Quantity produced by the reporting company within West Virginia.....	Bbls.
(b) Quantity purchased by the reporting company from others within West Virginia.....	Bbls.
(c) Quantity transported or conveyed by the reporting company within West Virginia, for others, production inside West Virginia only.....	Bbls.
(d) Quantity produced or purchased by the reporting company in other states and transported or conveyed by it into or through West Virginia.....	Bbls.
(e) Quantity transported or conveyed by the reporting company into or through West Virginia, for others, production outside West Virginia only.....	Bbls.
(f) Total quantity transported or conveyed by the reporting company within West Virginia.....	Bbls.
(g) Are the barrels above reported, barrels of 42 gallons each?; if not, give the number of gallons per barrel.....	

5. PRODUCTS AND DISTILLATES OF CRUDE OIL OR PETROLEUM TRANSPORTED WITHIN WEST VIRGINIA BY MEANS OF PIPE LINES.

(a) Quantity produced by the reporting company within West Virginia.....	Bbls.
(b) Quantity purchased by the reporting company from others within West Virginia.....	Bbls.
(c) Quantity transported or conveyed by the reporting company within West Virginia, for others, production inside West Virginia only.....	Bbls.
(d) Quantity produced or purchased by the reporting company in other states and transported or conveyed by it into or through West Virginia.....	Bbls.
(e) Quantity transported or conveyed by the reporting company into or through West Virginia, for others, production outside West Virginia only.....	Bbls.
(f) Total quantity transported or conveyed by the reporting company within West Virginia.....	Bbls.
(g) Are the barrels above reported, barrels of 42 gallons each?; if not, give the number of gallons per barrel.....	

6. NATURAL GAS TRANSPORTED WITHIN WEST VIRGINIA BY MEANS OF PIPE LINES.

(a) Quantity produced by the reporting company within West Virginia.....	M. Cu. Ft.
(b) Quantity purchased by the reporting company from others within West Virginia.....	M. Cu. Ft.
(c) Quantity transported or conveyed by the reporting company within West Virginia, for others, production inside West Virginia only.....	M. Cu. Ft.
(d) Quantity produced or purchased by the reporting company in other states and transported or conveyed by it into or through West Virginia.....	M. Cu. Ft.
(e) Quantity transported or conveyed by the reporting company into or through West Virginia, for others, production outside West Virginia only.....	M. Cu. Ft.
(f) Total quantity transported or conveyed by the reporting company within West Virginia.....	M. Cu. Ft.

I, (a)..... (b).....
of the company whose return showing the quantities of crude oil or petroleum, or the products and distillates thereof, and natural gas, transported by means of pipe lines within the State of West Virginia during the year ending July 1, 1919 is as above set forth, on my oath say that the above return was prepared from the original books, records and papers of the reporting company; that I am thoroughly familiar with the business of the reporting company; and that the items entered in the foregoing return and supplementary statement, and in any additional list or lists attached to and made a part of this return and numbered consecutively from to, are, to the best of my knowledge and belief, and from the best information I have been able to obtain, true and correct in each and every particular.

Sworn to and subscribed before me this..... day of....., 19.....

(c)

Seal of Officer
Taking Affidavit.

(Notary Public.)

(d)

My commission expires on the..... day of....., 19....

(a) Maker of return. (b) Insert here "owner," "partner," "president," "vice-president" or "treasurer," as the case may be. (c) Maker of return will sign here.
(d) Insert here "owner," "partner," "president," "vice-president" or "treasurer," as the case may be.

To Persons, Firms and Corporations Engaged in the Transportation of Oil and Gas Within the State of West Virginia, by Means of Pipe Lines:

Section 3, Chapter 5, Acts Extra Session of the Legislature of 1919, invests full power and authority in the State Tax Commissioner, and makes it his duty, to prescribe forms for returns and assessments, and to make, issue and put in force all necessary and needful rules and regulations for the ascertainment and assessment of the privilege tax imposed upon persons, firms and corporations by said chapter. In pursuance of this provision, there is appended hereto, together with the law itself, such rulings, as, at this time, appear to be necessary and proper.

The form of return is also prescribed. As this is the first tax of the kind imposed by the Legislature of this State, the form of return may contemplate a more comprehensive showing than that which may be prescribed for subsequent years. However, the Tax Commissioner, at this time, believes the information asked for is essential to a just and uniform assessment against those persons, firms and corporations which are subject to the tax imposed, and respondents are expected to supply all information asked for, if available. Should it be impossible to furnish any particular information asked for, respondents must so state. There should appear in each blank space provided for information **SOME NOTATION** to indicate that the information desired has not been overlooked. The word "NONE" may be used where that word expresses the **FACTS**.

Respectfully,

Charleston, W. Va., June 30, 1919.

W. S. HALLANAN, State Tax Commissioner.

THE LAW—Chapter 5, Acts Extraordinary Session of the Legislature of 1919, State of West Virginia.

[Passed March 31, 1919. In effect ninety days from passage. Approved by the Governor April 1, 1919.]

AN ACT to levy a privilege tax on any person, firm or corporation engaged in the transportation of crude oil or petroleum, or the distillates thereof, or of natural gas, by means of pipe lines, authorizing the State Tax Commissioner to provide rules and regulations for the collection of such tax, and defining the duties of the State Tax Commissioner hereunder.

Be it enacted by the Legislature of West Virginia:

Section 1. No person, firm or corporation, hereinafter called company, after the first day of July, one thousand nine hundred and nineteen, shall engage in or continue in the business of the transportation of crude oil or petroleum, or the distillates thereof, or of natural gas, by means of pipe lines, without the payment of an annual privilege tax hereby imposed for engaging in such business; provided, however, that nothing contained in this act shall apply to any person, firm or corporation engaged in the business aforesaid where the crude oil, petroleum or distillates thereof, or natural gas, is by the entire system of such person, firm or corporation, transported a distance of less than ten miles.

Sec. 2. Every person, firm and corporation engaged in this state in the transportation of either crude oil or petroleum, or the products and distillates thereof, or of natural gas, or both, by means of pipe lines for sale to consumers within or without the state, or use within or without the state in the making of any products derived therefrom, shall pay to the state, as an annual privilege tax for engaging in such business in the state, two cents for each barrel of crude oil or petroleum, or the distillates thereof, and one-third of one cent for each thousand cubic feet of such natural gas as is so transported or conveyed within this state. Provided, that only one such tax, annually, shall be required to be so paid.

Sec. 3. Every person, firm or corporation liable to tax imposed by this act, shall, within sixty days after the first day of July, one thousand nine hundred and nineteen, and within sixty days after the first day of July in each year thereafter, deliver to the State Tax Commissioner a return in writing showing the quantity of crude oil or petroleum, or the distillates thereof, or of natural gas transported or conveyed within this state during the fiscal year ending on the first day of July next preceding. Such return shall be signed and sworn to by the person making the same for himself or a partnership, and by the president, vice-president or other principal accounting officer making the same for a corporation, which return shall be in the form prescribed by the State Tax Commissioner. The State Tax Commissioner is hereby invested with full power and authority and it is hereby made his duty to prescribe forms for returns and assessments and to make, issue and put in force all necessary and needful rules and regulations for ascertaining and assessing the tax hereby imposed upon every company.

Sec. 4. The State Tax Commissioner shall ascertain and assess the tax upon the company making a return, and shall notify it of the amount of such tax by notice deposited in the post office addressed to such company at its principal office or place of business. Such ascertainment of the tax shall be final and conclusive, unless the same be appealed from in the manner following within thirty days after such notice is so deposited. If any company fail or refuse to make return, the State Tax Commissioner shall proceed, in such manner as may be proper, to obtain the facts and information required to be furnished by such return; and to this end he may, by himself or his duly appointed agent, make examination of the books, records and papers of any such company, and may take the evidence, on oath, of any person who he may believe shall be in possession of facts or information pertinent to the subject of inquiry, which oath he or the agent so appointed by him may administer. As soon as possible after procuring such information as he may be able to do with respect to any company failing or refusing to make a return, the State Tax Commissioner shall proceed to ascertain and assess the tax upon such company, and shall notify it of the amount thereof as hereinbefore provided. And his act shall be final as to any company which refused to make a return.

Sec. 5. If any such company, making a return as provided by this act, feels aggrieved by the assessment so made upon it for any year by the State Tax Commissioner, it may apply to the Board of Public Works by petition in writing, within thirty days after the notice is deposited as provided in the preceding section, for a hearing and a correction of the amount of the tax so assessed upon it by the State Tax Commissioner, in which petition shall be set forth the reasons why such hearing should be granted and the amount such tax should be reduced. The board shall promptly consider such petition, and may grant such hearing or deny the same. If denied, the petitioner shall be forthwith notified thereof; if granted, the board shall notify the petitioner of the time and place fixed for such hearing. After such hearing the board may make such order in the matter as may appear to them just and lawful, and shall furnish a copy of such order to the petitioner.

Sec. 6. No injunction shall be awarded by any court or judge to restrain the collection of all or any part of the taxes imposed and assessed under this act, except upon the ground that the assessment thereof was in violation of the constitution of the United States, or of this state; or, that the same were fraudulently assessed; or, that there was a mistake made in the amount of taxes assessed; and in case of a mistake no such injunction shall be awarded, unless application shall be first made to the Board of Public Works to correct the alleged mistake, and the board shall refuse to do so, which fact shall be stated in the bill, or unless the complainant pay into the treasury of the state all taxes appearing by the bill of complaint to be owing.

Sec. 7. Every company so assessed with taxes shall pay the same into the state treasury within sixty days after the date of the mailing of the notice of the amount thereof, or within thirty days after notification of the amount thereof, when ascertained and assessed by the Board of Public Works on appeal. All taxes assessed under provisions of this act against any such company shall constitute a debt to the state, and may be collected by action of assumpsit or appropriate legal proceeding, which remedy shall be in addition to all other existing remedies for the collection of taxes. It shall be the duty of the State Tax Commissioner

Sec. 8. Any person required or authorized by law to make, sign or verify any return by this act, who makes any false or fraudulent return or statement with intent to defraud the state or defeat or evade the payment of the tax, or any part thereof, imposed by this act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred dollars, nor more than five thousand dollars, to which fine shall be added the costs of prosecution.

Sec. 9. Any person engaging or continuing in the business aforesaid without having first secured a license, as hereinbefore provided, shall be liable to a fine of not less than one thousand dollars nor more than ten thousand dollars.

Sec. 10. All acts and parts of acts inconsistent herewith are hereby repealed.

RULES AND REGULATIONS CONCERNING THE PRIVILEGE TAX

—Required of Persons, Firms and Corporations—

For the Privilege of Transporting or Conveying Oil, Gas, etc., By Means of Pipe Lines Owned, Leased or Operated.

STATE OF WEST VIRGINIA, OFFICE OF STATE TAX COMMISSIONER, Charleston, June 30, 1919.

1. DEFINITIONS

- 1-a. "Commissioner," as used in these rules, shall mean the State Tax Commissioner of the State of West Virginia.
- 1-b. "Company," as used in these rules, shall include all persons, firms, partnerships, corporations, joint-stock companies and associations liable for the privilege tax.
- 1-c. "Oil or gas," as used in these rules, shall include crude oil or petroleum, or the products and distillates thereof, and natural gas.
- 1-d. The "entire system" of a company shall be understood to embrace all pipe lines used in the transportation of oil or gas, whether owned, leased or operated and including trunk, gathering and distributing lines.

2. GENERAL PROVISIONS

- 2-a. The adoption of these rules shall not preclude the Commissioner from revoking or amending same, in whole or in part, or from requiring additional information or supplemental or amended returns.
- 2-b. These rules shall not in any way relieve any company from any of its duties under the laws of the State of West Virginia.
- 2-c. Each rule issued by the Commissioner in connection with the privilege tax is to be considered and treated by the reporting company as a ruling of the Commissioner until revoked or superseded.

3. THE PRIVILEGE TAX

3-a. The "privilege tax," as used in these rules, shall be understood to mean the privilege tax upon persons, firms and corporations imposed by Chapter 5, Acts Extraordinary Session of the Legislature of 1919. Said tax is construed as being for the particular privilege of transporting or conveying oil or gas, or both, within the State of West Virginia, for sale to consumers within or without the state, or use by the reporting company or others within or without the state in the making of any products derived therefrom, by means of pipe lines, owned, leased or operated the aggregate length of which, including trunk, gathering and distributing lines, is ten miles or more, the amount of such tax to be the equivalence of two cents for each barrel of oil or petroleum, or the products and distillates thereof, and one-third of one cent for each thousand cubic feet of natural gas, so transported or conveyed.

4. THE MEASURE FOR THE TAX

4-a. The quantity of oil and gas to be used as the measure for the privilege tax against a particular company shall be that quantity which has, but once, passed through the owned, leased or operated pipe lines of that company within the State of West Virginia during the year for which return is required, for sale to consumers within or without the state, or use by the reporting company or others within or without the state in the making of any products derived therefrom.

5. WHO SUBJECT TO PAY TAX

5-a. Every person, firm, partnership, corporation, joint-stock company and association which, during the year for which return is required, transported or conveyed within the State of West Virginia crude oil or petroleum, or the products and distillates thereof, or natural gas, or both, by means of pipe lines owned, leased or operated the aggregate length of which, including trunk, gathering and distributing lines, was ten miles or more is subject to pay the privilege tax.

6. WHO EXEMPT FROM PAYMENT OF TAX

6-a. Persons, etc., transporting oil or gas within the State of West Virginia during the year for which return is required by means of pipe lines owned, leased or operated the aggregate length of which, including trunk, gathering and distributing lines, was less than ten miles, are exempt under section one of the law.

7. WHO TO MAKE RETURNS

7-a. Every person, firm, partnership, corporation, joint-stock company and association engaged in the transportation of oil or gas within the State of West Virginia, by means of pipe lines owned, leased or operated is liable for the filing of returns under the privilege tax law, regardless of whether the mileage of its entire system is less or more than ten miles.

7-b. Companies whose entire system of pipe lines is less than ten miles in length, and, therefore, exempt from payment of the privilege tax by the provision contained in section one of the law shall, by affidavit, at the request of the Commissioner, establish their right to the exemption provided, in which case it will not be sufficient to merely declare that they are exempt, but they must show the mileage of their entire system. A satisfactory return from such companies may be made on the prescribed form (Form 200) by simply filling in the name of the company, answering Question 3, leaving Questions 4, 5, 6 and 7 blank and swearing to the return as thus made.

7-c. Subsidiary Companies.—Every company liable for the privilege tax, regardless of its relation to another company, is held to be a separate and distinct entity, and, unless it comes within the class of companies specifically exempted by section one of the law, must make a separate and distinct return, complete in every detail.

8. TIME FOR FILING RETURNS

8-a. Section 3 provides that all companies liable to the privilege tax shall, within sixty days after the 1st day of July, 1919, and within sixty days from the first day of July in each year thereafter, deliver its return in writing to the State Tax Commissioner.

8-b. The commissioner is not authorized to extend the time for filing returns.

8-c. If a return is made and placed in the United States mails, properly addressed, and postage paid, in ample time, in due course of mails, to reach the office of the Commissioner on or before August 30th, and should the return not be actually received until subsequent to that date, it will be considered and treated as having been filed within the prescribed time.

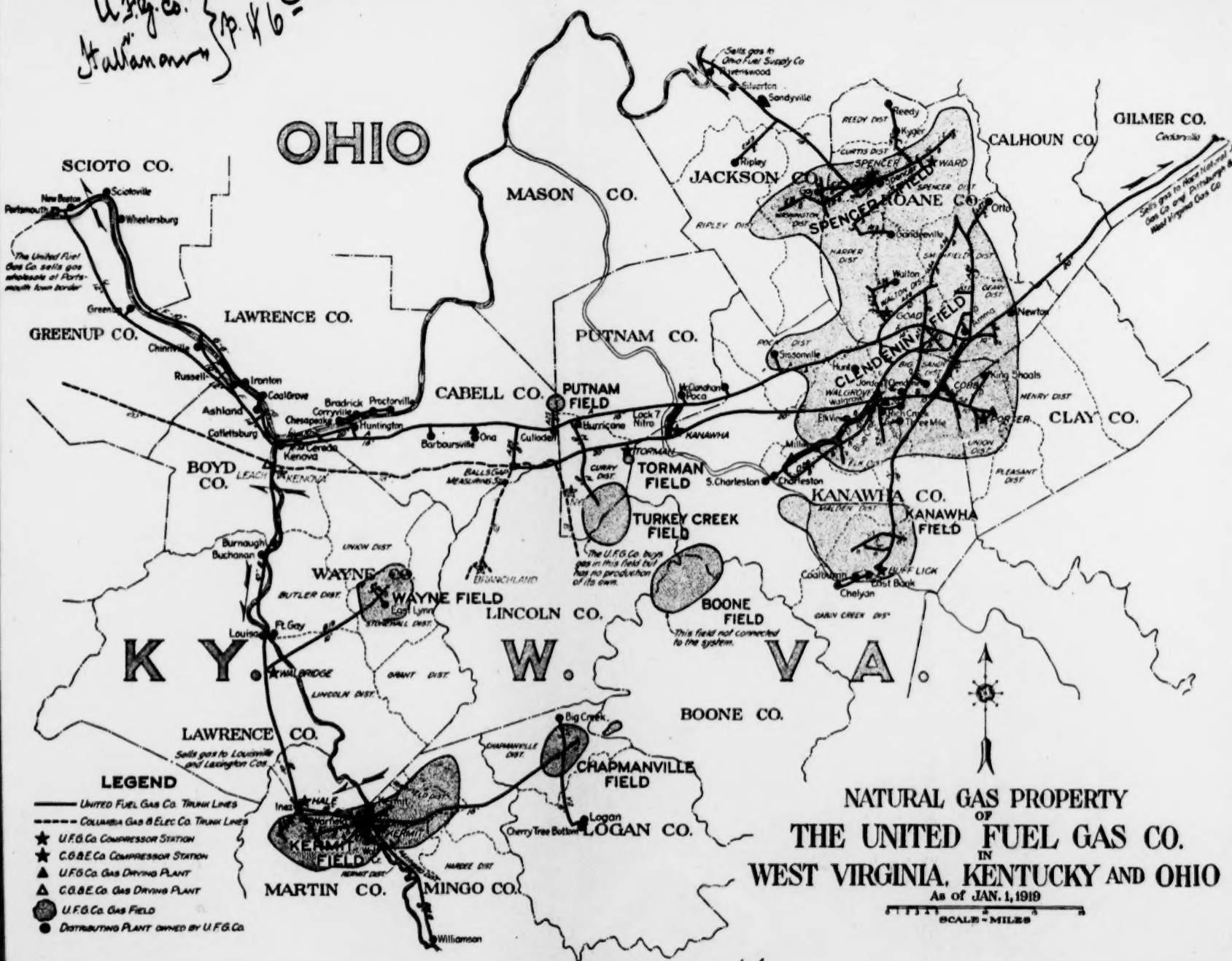
9. MANNER IN WHICH RETURNS ARE TO BE MADE

9-a. Blank forms, etc.—Under the authority conferred by the act, forms of return have been prescribed. Failure on the part of any company liable to the privilege tax to receive a prescribed blank form will not excuse it from making the return required by law, or relieve it from any penalties for failure to make the return in the prescribed time. Companies not supplied with the proper forms for making the return should make application therefor to the Commissioner in ample time to have its return prepared, verified and filed on or before August 30th. Each corporation should carefully prepare its return so as to fully and clearly set forth the data therein called for.

9-b. The books of a company are assumed to show the facts as to the quantities of oil or gas transported. Hence they will be taken as a guide in determining the quantities to use as a measure for the privilege tax.

W. S. HALLANAN, State Tax Commissioner.

No. 8355
U.F.G. Co.
H. J. G. Co.
p. 46C



LEGEND

- UNITED FUEL GAS CO. TRUNK LINES
- - - COLUMBIA GAS & ELEC. CO. TRUNK LINES
- ★ U.F.G. Co. COMPRESSOR STATION
- ★ C.B.E. Co. COMPRESSOR STATION
- ▲ U.F.G. Co. GAS DRYING PLANT
- ▲ C.B.E. Co. GAS DRYING PLANT
- U.F.G. Co. GAS FIELD
- DISTRIBUTING PLANT OWNED BY U.F.G. Co.

NATURAL GAS PROPERTY
OF
THE UNITED FUEL GAS CO.
IN
WEST VIRGINIA, KENTUCKY AND OHIO

As of JAN. 1, 1919
SCALE - MILES

446C



(7) United Fuel Gas Company, Plaintiff, vs. Walter S. Hallanan,
as State Tax Comr., &c., et al., Defendants. In Chancery.

EXHIBIT "MAP" FILED WITH THE BILL OF COMPLAINT IN THE
ABOVE-STYLED CAUSE.

(Here follows map, marked page 46c).

Filed Aug. 26, 1919 in Kanawha Circuit Court, Clerk's Office.

A. P. HUDSON,
Clerk.

In Chancery.

No. 5433.

UNITED FUEL GAS COMPANY, a Corporation,

vs.

WALTER S. HALLANAN, State Tax Commissioner, et al.

This day came again the plaintiff, by its counsel, and each of the defendants, by their counsel; and upon motion of said defendants, the further hearing of the plaintiff's motion for an injunction herein is continued until the 16th day of October, 1919.

47 (Endorsed on back:) (8). United Fuel Gas Company vs. Walter S. Hallanan, State Tax Commissioner, et al. In Chancery. Order Continuing. Enter: H. D. Rummel, Judge. Entered in Chanc. Order Book Sep. 15, 1919, No. 42, Page 78. O. K. S. B. Avis.

In Chancery.

No. 5433.

UNITED FUEL GAS COMPANY, a Corporation,

vs.

WALTER S. HALLANAN, State Tax Commissioner, et al.

This day came again the plaintiff, by its counsel, and each of the defendants, by their counsel; and upon motion of said defendants, the further hearing of the plaintiff's motion for an injunction herein is continued until the 30th day of October, 1919.

48 (Endorsed on back:) (9). United Fuel Gas Company vs. Walter S. Hallanan et al. In Chancery. Order continuing. Enter: H. D. Rummel, Judge. Entered in Chy. Order Book, Oct. 22, 1919, No. 42, Page 149. O. K. Fred O. Flue, of counsel for defendants.

In Chancery.

No. 5433.

UNITED FUEL GAS COMPANY, a Corporation,

v.

WALTER S. HALLANAN, State Tax Commissioner, and E. T. ENGLAND, Attorney General.

This day came the defendants, Walter S. Hallanan, State Tax Commissioner of West Virginia, and E. T. England, Attorney Gen-

eral of West Virginia, by F. O. Blue, John T. Simms, S. B. Avis and W. G. Mathews, their attorneys, and by leave of court tendered and filed in open Court their joint and several demurrer and answer to the plaintiff's bill of complaint, and thereupon, on motion of the plaintiff Malcolm Jackson and R. G. Altizer, its attorneys, the further hearing of this case is postponed and continued until Monday November 24th, 1919, at 9:30 o'clock in the forenoon, at which time it is by consent of parties now set for hearing.

(Endorsed on back:) (10). United Fuel Gas Co., Plaintiff, v. Walter S. Hallanan, State Tax Commissioner, and E. T. England, Attorney General. In Chancery. Order. Enter: H. D. Rummel, Judge. October 30, 1919. Entered in Chy. Order Book Oct. 30, 1919, No. 42, Page 160.

In the Circuit Court of Kanawha County, West Virginia.

In Equity.

UNITED FUEL GAS COMPANY, a Corporation, Plaintiff,

v.

WALTER S. HALLANAN, as State Tax Commissioner of the State of West Virginia, and E. T. England, as Attorney General of the State of West Virginia, Defendants.

The Joint and Separate Demurrer and Answer of Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the State of West Virginia, to the Bill in Equity Exhibited Against Them by the United Fuel Gas Company and Filed in said Court.

To the Honorable H. D. Rummel,
Judge of said Court:

These defendants, Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the State of West Virginia, demur to the complainant's bill of complaint filed against them in the above entitled cause, and for grounds of demurrer say that said bill is not sufficient in law or in equity to justify the relief therein prayed or any relief, and without waiving said demurrer, but relying and insisting thereon, for answer to said bill of complaint, or to so much thereof as they are advised it is necessary or material for them to answer, answering say:

I.

These defendants admit the averments of Paragraph I of the plaintiff's bill of complaint as to the incorporation and organization of the plaintiff and the location of its principal office.

II.

These defendants admit the averments of Paragraph II of said bill of complaint as to the offices held by these defendants, namely, that the said Walter S. Hallanan is State Tax Commissioner of the State of West Virginia and that the said E. T. England is the Attorney General of said State, and, as such officers, are charged with the duties thereof under the Constitution and laws of said State.

III.

These defendants admit the incorporation of the United Fuel Gas Company, the subsequent incorporation of the Kermit Gas Company, the conveyance by the United Fuel Gas Company to the Kermit Gas Company of all the property and assets of the former Company, and the subsequent change of name of the Kermit Gas Company to United Fuel Gas Company. These defendants do not admit the averments of said Paragraph III, to the effect that said United Fuel Gas Company or its predecessor in title were incorporated or organized in any way as subsidiary to the Ohio Fuel Supply Company, and these defendants aver the fact to be that said Kermit Gas Company (which subsequently changed its name to United Fuel Gas Company) was regularly incorporated and organized under the laws of the State of West Virginia as a separate and independent corporation under a charter issued by the Secretary of State February 1, 1916, for the purpose and with the powers set forth and defined, which powers cover a very large number of purposes and permit the conduct of a very large number of businesses, among the purposes specified and powers conferred by said certificate of incorporation being the following:

"To carry on the business of searching, mining, boring and digging for, producing, refining, manufacturing, treating, preparing for market, purchasing, selling and distributing to public and private consumers for light, heat, power, fuel and other purposes, and generally dealing in natural and artificial gas, petroleum and other oils, coal and other minerals and mineral substances, and all kinds of products and by-products arising therefrom; generally to manufacture, buy, sell, exchange and deal in any and all of the above products and by-products and all implements and material used in the production thereof; to store, warehouse and transport the natural and artificial gas and petroleum and other oils owned by the corporation in so far as the same may be useful for or in connection with the conduct of the business of the corporation; to transport such natural gas by pipe lines for public use, and to carry on any other incidental business (whether mining, manufacturing or otherwise) which may be conveniently conducted in conjunction with any of the business of the corporation."

These defendants here file a duly certified copy of the certificate of Incorporation of said Kermit Gas Company (which subsequently changed its name to United Fuel Gas Company), together with a

duly certified copy of the Certificate of change of name, as herein set out, as "Defendants' Exhibit No. 1" and ask that the same may be taken and read as part of this answer.

These defendants deny the averments of Paragraph III, to the effect that the plaintiff was organized either as a subsidiary of the Ohio Fuel Oil Company or for the primary purpose of transporting and delivering to it gas produced in West Virginia, and aver that the true purpose and legal effect of the plaintiff's incorporation are set forth and defined in its charter aforesaid, and fixed thereby, and that, under and pursuant to such charter provisions, the plaintiff and its predecessor in title have since their incorporation carried on, and the plaintiff is now carrying on, a most extensive business within the State of West Virginia in producing, transporting, distributing and selling natural gas, all within said State, and that in such business, and in all of its branches, said plaintiff enjoys and has a virtual and practical monopoly throughout the Southern portion of the State of West Virginia, and in such section sells and supplies gas in many cities and towns, and to all classes of consumers, industrial and manufacturing, as well as domestic consumers of such gas, and that its said business, so conducted in its various branches wholly within the State of West Virginia, amounts to many millions of dollars per annum.

IV.

These defendants admit the averments of Paragraph IV in said bill as to the acquisition by the plaintiff in September, 1909, of the property and assets of the United States Natural Gas Company.

V.

These defendants admit that the plaintiff has been engaged in transporting and selling gas both within and without the State of West Virginia, as set forth in Paragraph V of the plaintiff's bill, but are without information as to the exact amount of natural gas produced by said plaintiff from wells upon lands situate in West Virginia, or as to the amount of gas purchased by said plaintiff from others during the year 1919 or as to the amounts thereof sold or disposed of within and without said State of West Virginia, and if such amounts and quantities should be deemed material in this suit, these defendants call for proof thereof. But these defendants specifically aver that, since the date of its incorporation and continuously to this time, said plaintiff has carried on a very extensive business of producing, collecting, transporting and selling gas wholly within the State of West Virginia, and that, as hereinbefore stated, this business in its various branches wholly within said State constitutes a very large and comprehensive portion of the plaintiff's business, and is not in any way either subsidiary or subordinate to such portion of the plaintiff's business as consists in furnishing and supplying gas to purchasers or consumers thereof in the States of Kentucky and Ohio, or elsewhere.

These defendants are not advised in detail as to the trunk pipe lines alleged to be owned and used by the plaintiff for the transpor-

tation and sale of natural gas, as set forth in detail in Clauses (a), (b), (c), (d), (e), (f) and (g) of Paragraph V of the plaintiff's bill, and as shown on map filed therewith, but assume that the ownership and location of said pipe lines are correctly stated in said bill. These defendants are advised and aver that in the cases of sales of gas by the plaintiff to the Ohio Fuel Supply Company, Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh and West Virginia Gas Company, said gas is in each instance sold and delivered by the plaintiff to said companies, respectively, at points within the State of West Virginia, and that thereafter said defendant Companies have the right to and do use and sell said gas as its own property, and as matter of fact, in some cases, do sell and deliver a part of the same to consumers in the State of West Virginia.

These defendants are advised and aver that there is nothing contained in the contracts under which gas is sold by the plaintiff to said named companies which in any way provides or requires said gas to be thereafter transported into States other than West Virginia, or sold to consumers in States other than West Virginia, but are advised and aver that after the sale and delivery as hereinbefore set forth said gas is the property of said Companies, respectively, for such use and sale as they may elect and determine, without qualification or restriction.

These defendants are advised, and therefor aver, that the contracts under which the plaintiff sells gas to said named Companies are in writing, and provides, in substance, that the prices therein named shall be automatically increased in the event of any additional tax being imposed upon said plaintiff by the State of West Virginia, and is broad enough in its language to cover and authorize an increased price for said gas to be paid sufficient to cover any increased tax which said plaintiff may be required to pay under Chapter 5 of the Extraordinary Session of the Legislature of West Virginia for the year 1919, and these defendants ask that the plaintiff be required to produce and file said contracts in this cause.

These defendants are without accurate information as to the averments in Paragraph 5 of the plaintiff's bill as to the amount of gas sold by it during the year ending July 1, 1919, to consumers in the States of Ohio, Kentucky and West Virginia, but believe it to be correct as therein stated that said Company did produce in West Virginia and did sell to consumers in West Virginia during said year at least the number of cubic feet of gas in said paragraph mentioned, to-wit, 11,590,650 M cubic feet, and avers that the whole of said gas was by said plaintiff transported from the place of production in said State of West Virginia to consumers of said gas, also within said State of West Virginia.

VI.

These defendants admit that the Legislature of West Virginia at its Extraordinary Session in the year 1919 enacted Chapter 5 of the laws of said session, laying a privilege tax upon persons, firms or corporations engaged in the transportation

of crude oil or petroleum, or the distillates thereof, or of natural gas by means of pipe lines, and say that said statute appears within the printed Acts of the Legislature of West Virginia at its Extraordinary Session for the year 1919, and here refer thereto for the terms and provisions thereof.

These defendants aver that said Statute was duly and regularly enacted and passed by the Legislature of West Virginia on March 31, 1919, and became effective ninety days after its passage, and was duly and regularly approved by the Governor of West Virginia April 1, 1919, and was, and is, in all respects a duly enacted and valid law of the State of West Virginia.

These defendants aver that the true interpretation and effect of said statute is to provide that any person, firm or corporation shall, after the 1st day of July, 1919, engage or continue within the State of West Virginia in the business or intrastate transportation of crude oil or petroleum, or the distillates thereof, or of natural gas by means of pipe lines without the payment of the annual privilege tax imposed by said statute for engaging in such business; provided, however, that nothing in said statute shall apply to any person, firm or corporation engaged in the business aforesaid where the crude oil or petroleum, or the distillates thereof, or of natural gas, is by the entire system of such person, firm or corporation transported a distance of less than ten miles.

VII.

These defendants admit that the defendant, Walter S. Hallanan, has heretofore prescribed a form of return to be made by persons, firms or corporations subject to such tax, and has also promulgated certain rules for the guidance and regulation of all persons subject to such tax, and that a true copy of such form and return is filed by the plaintiff as part of its bill, marked "Exhibit B". These defendants say that such form was prescribed and rules promulgated on or about June 30, 1919, but that, owing to some delay in causing the same to be printed, they were not actually printed and ready for distribution until about a week or ten days thereafter. These defendants say that such form of return and rules were and are proper, and conform to and are justified by the terms and provisions of said statute. But they do not admit the correctness of the interpretation sought to be placed thereon by the plaintiff in Paragraph VII, and in succeeding paragraphs, of its bill of complaint.

VIII.

These defendants say that the statute aforesaid and the rules and regulations promulgated by said State Tax Commissioner are in writing and speak for themselves, and these defendants are advised that the said statute and said rules are, in all respects, lawful and valid.

These defendants further aver that they are not advised as to the number of cubic feet of natural gas used by the plaintiff at its carbon black plant at Barren Creek, Kanawha County, West Virginia,

or the distance which said gas used thereat is transported, but are advised that neither the quantity consumed at said plant, nor the distance which the same may be transported, is material in this case, and denies that such averment in any way constitutes just grounds by the plaintiff for the relief prayed in its bill.

58

IX.

These defendants are not advised as to the rates fixed by ordinance of the City of Ironton and the TOWNS of Chesapeake and Proctorville, in the State of Ohio, for gas sold by the plaintiff to the inhabitants of said city and towns, or as to the price to be paid for gas sold by said plaintiff to the Ohio Fuel Supply Company, Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh and West Virginia Gas Company, or the terms of the contracts under which said gas is so sold, but are advised, and therefore aver that any and all of such contracts and the sales and rates thereby fixed are not material in this case, and in no way constitute ground or reason for awarding the relief herein sought. And these defendants say that the same is true as to the averments in Paragraph IX of the plaintiff's bill as to said plaintiff transporting gas produced within the State of West Virginia to points in other States, there to be used and consumed, and as to the contracts, in said paragraph mentioned, between the plaintiffs and the Portsmouth Gas Company, the Central Kentucky Natural Gas Company and Louisville Gas & Electric Company.

These defendants are advised and aver that the State of West Virginia neither by said Chapter 5 of the Extraordinary Session of the Legislature of 1919, nor by the rules and regulations promulgated by the State Tax Commissioner, nor otherwise, has sought or attempted to levy any tax or impose any burden upon gas moving from the State of West Virginia to other States and from other States to the State of West Virginia and constituting interstate commerce, but, as hereinbefore set forth, said statute simply imposes a privilege tax upon persons, firms and corporations engaged in the business of local or intrastate transportation of oil and gas by pipe lines with the proviso and exception in said statute set forth.

59

X.

These defendants admit that the entire system of pipe lines owned by the plaintiff greatly exceeds ten miles in length, and believe that much more than 75 per centum of all the natural gas transported by it within the State of West Virginia is so transported for a distance of more than ten miles. These defendants deny that it is impossible for the plaintiff to determine the exact amount of natural gas so transported by it for a distance of less than ten miles, and are advised that, where necessary to do so, the plaintiff can ascertain and determine the exact distance of miles which gas is transported by its system, and the exact quantity thereof which is transported less than ten miles.

XI.

These defendants are advised and therefore admit the payment of taxes to the State of West Virginia as set forth in Paragraph XI of said bill of complaint, and aver that similar taxes have been paid by all corporations created under the laws of the State of West Virginia and possessing powers and duties similar to those of the plaintiff, and are advised and therefore aver that the payment of such enumerated taxes upon the physical property of the plaintiff, the license tax upon its charter, the special excise taxes, and the tax designated as its proportion of the expense of operating the Public Service Commission of the State of West Virginia do not constitute any ground or reason for rendering invalid the special privilege tax provided for by said Chapter 5 of the Acts of 1919, Extraordinary Session.

60

XII.

These defendants, upon information and belief, deny that there are numerous persons, firms and corporations in the state of West Virginia engaged in the transportation of natural gas by means of pipe lines, who transport all of the natural gas so produced by them a distance of less than ten miles by the entire system of lines owned, and deny that there are more than 600 hundred of such persons, firms and corporations who were so engaged in the production and transportation of natural gas in pipe lines in said State during the year 1918, and that the combined quantities of natural gas so transported by said persons, firms and corporations is equal to more than one-fourth of all the natural gas produced in the State. These defendants are advised and aver that there are very few, if, indeed, any, persons, firms or corporations in the State of West Virginia engaged in the business of transporting natural gas, as distinguished from the production thereof, whose entire system of pipe lines is less than ten miles in length, and aver that said allegation of said bill of complaint must refer to producers of natural gas, and not to transportation companies, and may be justified by the fact that a number of such gas producers have some quantity of pipes and lines connecting their wells with marketing or transportation companies, and these defendants believe and aver that such averment of said bill can only be justified or sustained by treating such producers as if each of them was actually engaged in the business of transporting gas, which these defendants aver is not the case.

These defendants further say that said statute does not operate to discriminate unjustly or unreasonably as against the plaintiff or in favor of other persons, firms and corporations of like character and engaged in the same or similar business as that of the plaintiff.

61

XIII.

These defendants deny that the statute complained of is a direct and immediate burden upon the commerce between the States of the

United States; and they deny that said statute impairs the obligations of valid contracts to which the plaintiff is a party; and they deny that the said statute is unconstitutional and void; that the necessary effect of the enforcement thereof will be to deprive the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment and other provisions of the Constitution of the United States, and to Section 10 of Article III of the Constitution of West Virginia; and defendants deny that the necessary effect of the enforcement of said statute will deprive plaintiff of its property without just compensation, contrary to the Fifth Amendment or other provisions of the Constitution of the United States, and to Section 9 of Article III of the Constitution of West Virginia; and defendants deny that the necessary effect of the enforcement of said statute will deny to complainant the equal protection of the laws and abridge the privileges and immunities of the plaintiff, contrary to the Fourteenth Amendment and other provisions of the Constitution of the United States, and to Section 1 of Article 10 of the Constitution of West Virginia; and they deny that said statute is an attempt to tax the privileges and franchises of certain persons and corporations as a law which is not uniform and equal; and these defendants deny that the necessary effect of the enforcement of said statute impairs or will impair the obligations of contracts to which plaintiff is a party, contrary to Section 10 of Article I of the Constitution of the United States, or of Section 4 of Article III of the Constitution of the State of West Virginia; and these defendants deny that the enforcement of said statute against the plaintiff and others similarly situated will

62 necessarily regulate, restrict and, to a great extent, prohibit commerce between the States of the character conducted by the plaintiff, in that it will exact from plaintiff for the privilege of conducting its business between the States a tax amounting to more than \$100,000.00 annually. And these defendants deny that the effect of the enforcement of said statute will exact from the plaintiff any tax for the privilege of conducting its business between the States; and defendants aver that the effect of the enforcement of said statute exacts from the plaintiff a tax for the privilege of doing business in the State of West Virginia only.

These defendants further deny that said statute is null and void by reason of the indefinite and uncertain terms thereof in requiring the payment of a tax at the rate of one-third of one cent for each thousand cubic feet of natural gas transported by pipe line, without specification of the pressure at which such tax shall be computed. These defendants aver that in the conduct of its business said plaintiff purchases large quantities of gas from other producers, and that it sells all of the gas so purchased as well as all of the gas which it itself produces by measuring and metering the same and the price fixed by it thereon is measured in all cases by the number of thousands of cubic feet so sold to its consumers, and these defendants aver that the imposition and ascertainment of the tax provided by said statute can and will be ascertained by the same method of metering and measuring said gas as the plaintiff uses in purchasing and selling the same, and that there is no more uncertainty in ascertaining the

quantity so transported by the plaintiff for the purpose of computing said tax than there is in measuring the quantities purchased and sold by said plaintiff as herein set out.

These defendants further deny that said statute is unconstitutional, null or void, as averred in said bill, because it requires a report to be made to the State Tax Commissioner within sixty days after July 1, 1919, and within sixty days after the 1st day of July in each
63 year thereafter, as in said statute and the rules promulgated by the State Tax Commissioner provided, or because said plaintiff is unable to ascertain and report the quantity of gas transported by it by pipe line during the year ending July 1, 1919.

These defendants do not deny that the interruption or stoppage of the plaintiff's business would result in inconveniences, loss and damage to its consumers in the States of West Virginia, Ohio and Kentucky, but aver that the imposition of the tax provided in said Chapter 5 of the Acts of 1919, being a special privilege tax on the right of said Company to carry on its business of intrastate transportation of gas within the State of West Virginia, is a valid exercise of the State's taxing power and in no manner causes either interruption or stoppage of the business of said Company in furnishing gas to its consumers in said States.

These defendants admit that they, and each of them, claim that the plaintiff Company is carrying on the business of intrastate transportation of gas within the State of West Virginia, and that by reason thereof it is subject to the payment of the annual privilege tax imposed by said statute for engaging in such business, and accordingly said State Tax Commissioner claims and demands that the plaintiff comply with the terms of said statute and the reasonable rules promulgated by him by filing the report thereunder, which will enable said State Tax Commissioner to ascertain and fix the amount of said tax for the privilege of conducting such business for the year commencing July 1, 1919; and these defendants, and each of them, admit that it is their intention to take all proper steps authorized by law and devolving upon them, or either of them, for the purpose of requiring such return to be made and such tax ascertained and paid. But these defendants, and each of them state and aver that, pending this litigation and an adjudication determining the validity of said statute,
64 they, nor either of them have any intention or expectation of attempting to collect or enforce any penalties under said statute for failure to make return or to pay the tax therein provided, or to proceed against said corporation or any officer or agent thereof for having engaged or continued in the business aforesaid without having first secured a license therefor as provided in said statute.

These defendants deny that said statute constitutes any cloud upon the property, business or franchises of the plaintiff, or will subject it to a multiplicity of suits in such a way as to render said statute invalid or its provisions unenforceable, and particularly in any such way as would justify the plaintiff herein seeking relief by injunction in equity.

XV.

These defendants, upon information, deny the averment of the plaintiff's bill that it was the intention of the Legislature on enacting said Chapter 5, Acts 1919, Extraordinary Session, that the tax therein provided should be assessed upon all of the natural gas transported by means of pipe lines of the plaintiff for the sale to the consumers thereof, whether within or without the State, or use within or without the State in the making of any products derived therefrom; and deny that the Legislature intended by the statute that the greater part of said tax, or any part thereof, should be assessed upon the privilege of transporting natural gas from the State of West Virginia into other States of the United States, and that less than one-half of such tax should be assessed upon the privilege of transporting such gas between different points within the State of West Virginia. On the contrary, these defendants aver that the actual intent and legal object of said statute is not to assess any tax upon natural gas transported by pipe lines, whether within or without the State, but to

65 levy a special privilege tax against persons, firms or corporations engaged in the business of the transportation of natural gas within the State of West Virginia, the amount of said tax to be determined as in said statute provided, and the measure thereof being therein and thereby fixed and indicated.

These defendants, upon information and belief, deny that said Chapter 5, Acts of 1919, Extraordinary Session, is unconstitutional or invalid for any ground or reason set forth by said plaintiff in its bill of complaint, or for any other reason as conflicting with any provision of the Constitution of the United States or the Constitution of the State of West Virginia, and aver that said statute was, and is, in all respects, constitutional and valid and a law properly enacted by the State of West Virginia.

Defendants therefore pray that the prayer of the plaintiff's bill be denied and that upon final hearing said bill be dismissed at the plaintiff's costs, and, having fully answered, these defendants, as in duty bound, will ever pray, etc.

E. T. ENGLAND,

Attorney General of West Virginia;

WALTER S. HALLANAN,

State Tax Commissioner of West Virginia,

By COUNSEL.

FRANK LIVELY,

S. B. AVIS,

FRED. O. BLUE,

JNO. T. SIMMS,

W. G. MATHEWS,

Solicitors.

STATE OF WEST VIRGINIA,
County of Kanawha, To-wit:

66 Walter S. Hallanan, being first duly sworn, on his oath says that he is the duly appointed and acting State Tax Commissioner for the State of West Virginia, and, as such, one of the defendants named in the foregoing answer; that he has read said answer and is familiar with the contents thereof; and that the matters and allegations therein contained are true, except so far as they are therein stated to be upon information and belief, and that so far as they are therein stated to be upon information and belief, he believes them to be true.

WALTER S. HALLANAN.

Taken, subscribed and sworn to before me this 28 day of October, 1919.

My commission expires on the 26 day of April, 1929.

J. H. CAIN,
Notary Public.

In the Circuit Court of Kanawha County, West Virginia.

In Equity.

UNITED FUEL GAS CO., a Corporation, Plaintiff,

v.

WALTER S. HALLANAN, as State Tax Commissioner of West Virginia, and E. T. England, as Attorney General of the State of West Virginia, Defendants.

The Joint and Separate Demurrer and Answer of Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the State of West Virginia.

67 Filed by order of Court Oct. 30, 1919, in Kanawha Circuit Court Clerk's Office.

A. P. HUDSON,
Clerk.

(12.)

Certified Copy of Certificate of Incorporation of United Fuel Gas Company.

Original Dated February 1, 1916.

THE STATE OF WEST VIRGINIA:

Kanawha Circuit Court.

In Equity.

UNITED FUEL GAS CO., Plaintiff,

vs.

W. S. HALLANAN, State Tax Comr., and E. T. ENGLAND, Attorney General, Defendants.

"DEFENDANT'S EXHIBIT No. 1" WITH ANSWER.

Filed by order of Court Oct. 30, 1919, in Kanawha Circuit Court Clerk's Office.

A. P. HUDSON,
Clerk.

68 STATE OF WEST VIRGINIA:

Certificate of Incorporation.

I, Stuart F. Reed, Secretary of State of the State of West Virginia, do hereby certify that an Agreement duly acknowledged and accompanied by the proper affidavits, has been this day delivered to me, which agreement is in the words and figures following:

I. The undersigned agree to become a corporation by the name of Kermit Gas Company.

II. The principal place of business of said corporation shall be located at Quarrier and Dunbar Streets, in the City of Charleston, in county of Kanawha and State of West Virginia, and its chief works shall be located in Elk District, Kanawha County, West Virginia and elsewhere in said State.

III. The objects and purposes for which this corporation is formed are as follows:

(a) To purchase, acquire and take over as a going concern, and to maintain and operate, all of the works, assets, property and franchises of every character whatsoever, of that certain corporation organized by the name of United Fuel Gas Company, under a certificate of incorporation bearing date the seventh day of March, Nineteen Hundred and Three, issued by the Secretary of State of the State of West

Virginia, and to assume all of the debts and obligations of said corporation.

(b) To carry on the business of searching, mining, boring and digging for, producing, refining, manufacturing, treating, preparing for market, purchasing, selling and distributing to public and private consumers for light, heat, power, fuel and other purposes, and generally of dealing in, natural and artificial gas, petroleum and other oils, coal and other minerals and mineral substances, and all kinds of products and by-products arising therefrom; generally to manufacture, buy, sell, exchange and deal in any and all of the above products and by-products and all implements and materials used in the production thereof; to store, warehouse and transport the natural and artificial gas and petroleum and other oils owned by the Corporation in so far as the same may be useful for or in connection with the conduct of the business of the corporation; to transport such natural gas by means of pipe lines for public use, and to carry on any other incidental business (whether mining, manufacturing or otherwise) which may be conveniently conducted in conjunction with any of the business of the corporation.

The foregoing are to be regarded as separate and independent statements of the objects and purposes for which the corporation is formed. In connection with and supplementary to said objects and purposes, the corporation shall have power:

(1) To apply for, obtain, purchase or otherwise acquire, any patents, licenses, trade-marks, rights, processes, formulas, and the like, which may seem capable of being used for any of the purposes of the corporation; and to use, exercise, develop, grant licenses in respect of, sell and otherwise turn to account the same.

(2) To erect, construct, make, purchase, lease, improve, maintain and operate or aid or subscribe toward the erection, construction, making, purchasing, leasing, improving, maintenance and operation of, mills, factories, storehouses, tanks, gas and oil works and refineries, plants for the production of electric light, heat and power, furnaces, ovens, merchandise stores, buildings, private pipe, telegraph, and telephone lines, roads, docks, piers, wharves, rolling stock, steamers, steamboats, tugs and works of all kinds, in so far as the same may appertain to, or be useful for, the conduct of the business of the corporation as above specified.

(3) To aid in any manner any corporation or association any bonds of or other securities or evidences of indebtedness of which, or shares of stock in which, are held by or for this corporation, or in which, or in the welfare of which, this corporation shall have any interest, and to do any acts or things designed to protect, preserve, improve, or enhance the value of any such bonds or other securities or evidences of indebtedness, or such shares of stock or other property of this corporation.

(4) To borrow or raise money for any of the purposes of the corporation, issue bonds, debentures, notes or other obligations of any

nature, or in any manner, for moneys so borrowed, and to secure the payment thereof and of the interest thereon, by mortgage upon, or pledge or conveyance or assignment in trust of, the whole or any part of the property of the corporation, real or personal, including contract rights and franchises, whether at the time owned or thereafter acquired; and to sell or pledge such bonds or discount notes or other obligations of the corporation for its corporate purposes.

(5) To guarantee the payment of dividends upon any shares of the capital stock of, or the performance of any contract by, any other corporation or association in which this corporation has an interest, and to endorse or otherwise guarantee the payment of the principal and interest, or either, of any bonds, debentures, notes, securities or other evidences of indebtedness created or issued by any such other corporation or association; subject, however, to the laws of the State of West Virginia in such case made and provided.

71 (6) To conduct its business in all its branches at one or more offices in the State of West Virginia and in all other States, territories, districts, colonies and dependences of the United States of America and in all foreign countries; and to acquire (by purchase, exchange, lease, hire or otherwise), own, hold, develop, operate, lease, sell, assign, transfer, exchange, mortgage, pledge, or otherwise dispose of, or turn to account, and convey, real and personal property, and rights and privileges therein, in the State of West Virginia and in all other states, territories, districts, colonies and dependencies of the United States of America and in all foreign countries.

(7) To acquire by purchase, subscription or otherwise, and to hold, sell, assign, transfer, exchange, mortgage, pledge, or otherwise dispose of, any shares of the capital stock of, or voting trust certificates for, any shares of the capital stock of, or any bonds or other securities or evidences of indebtedness issued or created by, any other corporation or association organized under the laws of the State of West Virginia or of any other State, territory, district or country, and to issue in exchange therefor shares of the capital stock, bonds or other obligations of this corporation; subject, however, to the laws of the State of West Virginia in such case made and provided. And, while the owner or holder of any such shares of capital stock, voting trust certificates, bonds or other obligations, to possess and exercise in respect thereof any and all the rights, powers and privileges of individual holders, including the right to vote on any shares of stock so held or owned; and upon the distribution of the assets or a division of the profits of this corporation, to distribute any such shares of capital stock, voting trust certificates, bonds or other obligations, or the proceeds thereof, among the stockholders of this corporation.

72 (8) To carry out all or any part of the foregoing objects as principal, factor, agent, contractor, or otherwise, either alone or in conjunction with any person, firm, association or other corporation, and in any part of the world; and, in carrying on its business and for the purpose of attaining or furthering any of its

objects, to make and perform such contracts of any kind and description, and to do anything and everything, necessary, suitable, convenient or proper for the accomplishment of any of the purposes, or the attainment of any one or more of the objects herein enumerated or incidental to the powers herein specified, or which shall at any time appear conducive to or expedient for the accomplishment of any of the purposes or for the attainment of any of the objects hereinbefore enumerated, if not inconsistent with the laws of the State of West Virginia.

The objects, purposes and powers specified in the foregoing clauses of this article III shall, except where otherwise expressed in said article, be in no wise limited or restricted by reference to or inference from the terms of any other clause of this or any other article in this certificate; and generally, the corporation shall be authorized to exercise and enjoy all other powers, rights, and privileges now existing under or hereafter granted by the laws of the State of West Virginia to corporations of this character, and the enumeration of certain powers as herein specified is not intended as exclusive of, or as a waiver of, any of the powers, rights or privileges granted or conferred by the laws of said State now or hereafter in force; provided, however, that nothing in this certificate contained shall authorize the corporation to engage in the business of a railroad company, a public telegraph, telephone or pipe line company, a canal company or a turnpike company; and provided further that the corporation shall not carry on any kind of business in any State, territory or country which a similar corporation organized under the laws of such State, territory or country could not carry on.

IV. The amount of the total authorized capital stock of said corporation shall be Ten Million (\$10,000,000.00) dollars, which shall be divided into one hundred thousand (100,000) shares of the par value of one hundred (\$100.00) dollars each; of which authorized capital stock the amount of five hundred (\$500.00) dollars has been subscribed, and the amount of five hundred (\$500.00) dollars has been paid.

V. The names and post office addresses of the incorporators and the number of shares of stock subscribed for by each, are as follows:

Names.	P. O. address.	No. of shares common stock.
H. P. Smith.....	Charleston, West Virginia.....	one
V. S. Arnold.....	Charleston, West Virginia.....	one
E. H. Bacon.....	Charleston, West Virginia.....	one
A. H. Dollison...	Charleston, West Virginia.....	one
R. G. Altizer.....	Charleston, West Virginia.....	one

VI. This corporation is to expire in fifty years from the date of the certificate of incorporation.

VII. The following provisions are hereby adopted for the regulation of the business and the conduct of the affairs of the corporation

and for the purpose of creating, defining, limiting and regulating the powers of the corporation, of the directors and of the stockholders.

(a) The board of directors shall have power, from time to time, to fix and determine and to vary the amount of working capital of the corporation; to determine whether any, and, if any, what part, of the surplus of the corporation or of the net profits arising
74 from its business shall be declared in dividends and paid to the stockholders and the time or times for the payment or declaration of dividends, subject, however, to the provisions of the by-laws of the corporation in respect thereof; to direct and determine the use and disposition of any of such surplus or net profits; and in its discretion the board of directors may use and apply any of such surplus or net profits in purchasing or acquiring any of the shares of the capital stock of the corporation, or any of its bonds, debentures, notes, scrip or other securities or evidences of indebtedness, to such extent and in such manner and upon such terms as the board of directors shall deem expedient; the shares of such stock and the obligations so purchased or acquired may be resold, unless they shall have been retired and cancelled. The board of directors may from time to time, subject to the laws of the State of West Virginia, accept subscriptions for, or sell, any shares of the capital stock of the corporation, upon such terms and conditions and for such considerations as the board in its discretion shall decide.

(b) The board of directors shall have power, by a resolution passed by a majority of the whole board, if authorized by the by-laws, to designate two or more of their number to constitute an executive committee, which committee, to the extent provided in said by-laws or in said resolution, shall have and may exercise the power of the board of directors in the management of the business and affairs of the corporation, and may have the power to authorize the seal of the corporation to be affixed to all papers which may require it.

(c) In addition to the powers and authorities hereinbefore or by statute expressly conferred upon them, the board of directors may exercise all such powers and do all such acts and things as may be exercised or done by the corporation; subject, nevertheless,
75-79 to the provisions of this certificate, of the by-laws of the corporation and of the laws of the State of West Virginia.

(d) All certificates for shares of the capital stock of the corporation which shall be issued by it shall be subject to all terms, conditions and limitations of the certificate of incorporation and by-laws of the corporation. The holder of any share of the capital stock of the corporation by accepting any such certificate, either before or after the purchase by the corporation of any property and the transfer thereof to the corporation or the execution and delivery of any contract, shall conclusively be deemed and held to consent to such purchase and transfer of such contract and to agree that all shares of the capital stock of the corporation issued in payment for such transfer of property or such contract shall be, or were when issued,

fully paid by such transfer or the execution and delivery of such contract and not liable to any further calls or assessments whatsoever.

(c) In the absence of fraud, no contract or other transaction between this corporation and any other corporation and no act of this corporation shall in any way be affected or invalidated by the fact that any of the directors of this corporation are pecuniarily or otherwise interested in, or are directors or officers of such other corporation; any director individually, or any firm of which any director may be a member, in the absence of fraud, may be a party to or may be pecuniarily or otherwise interested in, any contract or transaction of this corporation, provided that the fact that he or such firm is so interested shall be disclosed or shall have been known to the board of directors; and any director of this corporation who is also a director or officer of such other corporation or who is so interested may be counted in determining the existence of a quorum at any meeting of the board of directors of this corporation which shall authorize any such contract or transaction.

80

Given under our hands this 22nd day of January, 1916.

H. P. SMITH.

V. S. ARNOLD.

F. H. BACON.

A. H. DOLLISON.

R. G. ALTIZER.

Wherefore, The incorporators named in the said Agreement and who have signed the same, and their successors and assigns, are hereby declared to be from this date until the first day of February Nineteen Hundred and sixty six a Corporation by the name and for the purposes set forth in said agreement.

Given under my hand and the Great Seal of the said State, at the City of Charleston, this first day of February Nineteen Hundred and sixteen.

[SEAL.]

STUART F. REED,

Secretary of State.

STATE OF WEST VIRGINIA:

Certificate.

I, Stuart F. Reed, Secretary of State of the State of West Virginia, hereby certify that F. W. Crawford, President of Kermit Gas Company, a corporation created and organized under the laws of the State of West Virginia, has certified to me under his signature and the corporate seal of said corporation, that, at a meeting of the stockholders of said corporation, regularly held in accordance with the requirements of the law of said State, at the office thereof, in the City of Charleston, West Virginia, on the 5th day of February, 1916, at which meeting all of the stockholders of said corporation being represented by the holders thereof in person or by proxy and voting for the following resolution, the same was duly and regularly adopted and passed, to wit:

81

"Resolved that the name of this corporation be changed from Kermit Gas Company, its present name, to United Fuel Gas Company; and that this resolution be certified under the common seal and signature of the President of this corporation to the Secretary of State of the State of West Virginia, in the manner required by the laws of said State, so that after the same shall have been so certified and the said Secretary of State shall have issued his certificate of such change, this corporation shall be known as United Fuel Gas Company instead of Kermit Gas Company."

Wherefore, I do declare said change of name to be authorized by law, and that said corporation shall hereafter be known by the name of United Fuel Gas Company.

Given under my hand and the Great Seal of the said State, at the City of Charleston, this Fourteenth day of March, 1916.

[G. S.]

STUART F. REED,
Secretary of State.

(Certified under Section 906, Revised Statutes of the United States.)

UNITED STATES OF AMERICA,
State of West Virginia:

Office of Secretary of State.

I, Houston G. Young, Secretary of State of the State of West Virginia, being the officer who, under the constitution and laws
82 of said State, is authorized to *ussue* certificates of incorporation of all companies incorporated under the laws thereof, and being the officer authorized to issue certificates certifying changes in and amendments to such certificates of incorporation, and being the officer who is the keeper of all the records and papers relating to the creation of such incorporated companies and of changes in and amendments to said certificates of incorporation, including the powers of attorney of such incorporated companies, appointing a resident agent or attorney in said State, and of the reports of such incorporated companies, and being the officer authorized to authenticate exemplifications of the same, do hereby certify that the foregoing and annexed instrument is an exemplified copy, carefully compared by me with the original record now in my official custody as said Secretary of State, and found to be a true and correct copy of the certificate of incorporation of Kermit Gas Company, dated the 1st day of February, 1916, and of the certificate authorizing said change of name to United Fuel Gas Company, dated the 14th day of March, 1916, and recorded in the records of Corporations of my said office; and that said exemplification is in due form and made by me as the proper officer, and is entitled to have full faith and credit given it in every court and office within the United States.

In testimony whereof, I have hereunto attached my official signature and the Great Seal of the State of West Virginia, at the Capitol in the City of Charleston, this 10th day of October, 1919.

[SEAL.]

HOUSTON G. YOUNG,
Secretary of State.

83

In Chancery.

No. 5433.

UNITED FUEL GAS COMPANY, a Corporation,

VS.

WALTER S. HALLANAN, as State Tax Commissioner of the State of West Virginia, and E. T. England, as Attorney General of said State.

This day came the parties hereto by their respective counsel, and on motion of the plaintiff, and the defendants, by counsel consenting thereto, the further hearing of the matters involved herein is continued to the eighteenth day of December, 1919.

United Fuel Gas Co. vs. Walter S. Hallanan, State Tax Commissioner, et al. In Chy. Order. Entered as of Nov. 24th. H. D. Rummel, Judge. Entered in Chy. Order Book Nov. 26, 1919, No. 42, Page 225.

In Equity.

No. 5433.

UNITED FUEL GAS COMPANY

84

VS.

WALTER S. HALLANAN, State Tax Commissioner of West Virginia, and E. T. ENGLAND, Attorney General of West Virginia.

This day came the plaintiff by R. G. Altizer, its attorney, and the defendants by W. G. Mathews, their attorney, and, for reasons appearing to the Court, it is ordered that the motion for a temporary injunction order set for hearing in this Court for November 18, 1919, be, and the same is, continued until January 26, 1920, at which time, by consent of both the plaintiff and the defendants, said motion is now set for hearing, argument and submission.

(14.) United Fuel Gas Company vs. Walter S. Hallanan, State Tax Commissioner of West Virginia, and E. T. England, Attorney General of West Virginia. In Equity. Order. Enter: H. D. Rummel, Judge. Entered in Chy. Order Book Dec. 22, 1919, No. 42. Page 295.

In Chancery.

No. 5433.

UNITED FUEL GAS COMPANY

v.

WALTER S. HALLANAN, State Tax Commissioner, and E. T. ENGLAND,
Attorney General.

85 This day came the parties, plaintiff and defendants, by their respective counsel, and for reasons appearing to the Court the hearing in this case is postponed and continued until tomorrow, January 27, 1920, at 2 o'clock in the afternoon.

This order should have been entered on January 26th 1920, but being inadvertently omitted is entered now for then.

(15.) United Fuel Gas Company v. Walter S. Hallanan, State Tax Commissioner, and E. T. England, Attorney General. Order Continuing. Enter: H. D. Rummel, Judge. January 26-1920 Entered in Chy. Order Book Jan. 27-1920, No. 42, Page 368.

In the Circuit Court of Kanawha County, West Virginia.

In Equity.

UNITED FUEL GAS COMPANY, a Corporation, Plaintiff,

vs.

WALTER S. HALLANAN, State Tax Commissioner of West Virginia,
and E. T. England, Attorney General of West Virginia, De-
fendants.

86

Stipulation.

It is stipulated and agreed between the counsel representing the plaintiff and the defendants in the above entitled cause that the matters and facts hereinafter stipulated shall be taken and treated as facts proven by competent testimony in any hearing of said cause in said Court, whether interlocutory or final, and upon any hearing in any other Court to which said cause may be taken or removed by appeal, writ of error, or other process, viz:

1. That as to the averment in Paragraph III of the defendant's answer, as follows:

"These defendants deny the averments of Paragraph III, to the effect that the plaintiff was organized either as a subsidiary of the Ohio Fuel Supply Company or for the primary purpose of transporting and delivering to it gas produced in West Virginia, and aver that the true purpose and legal effect of the plaintiff's incorporation

are set forth and defined in its charter aforesaid, and fixed thereby, and that under and pursuant to such charter provisions, the plaintiff and its predecessor in title have since their incorporation carried on, and the plaintiff is now carrying on, a most extensive business within the State of West Virginia in producing, transporting, distributing and selling natural gas, all within said State, and that in such business, and in all of its branches, said plaintiff enjoys and has a virtual and practical monopoly throughout the Southern portion of the State of West Virginia, and in such section sells and supplies gas in many cities and towns, and to all classes of consumers, industrial and manufacturing, as well as domestic consumers of such gas, and that its said business, so conducted in its various branches wholly within the State of West Virginia, amounts to many million of dollars per annum."

the following facts are true and applicable:

(a) While it is true that plaintiff was not incorporated as a subsidiary of the Ohio Fuel Supply Company, but for the purpose set forth in its certificate of incorporation, yet the predecessor of the plaintiff referred to in the bill was incorporated with the intention on the part of the stockholders to utilize the same in connection with and as a subsidiary of said Ohio Fuel Supply Company in the year 1903, for the purposes set forth in the bill, and all of the capital stock of the said plaintiff's predecessor was owned by said Ohio Fuel Supply Company until some time in the year 1909, in which latter year in connection with the purchase of the properties of the United States Natural Gas Company, it disposed of fifty-one (51) per cent. of said capital stock, which share so disposed of came later to be, and now is, owned by the Columbia Gas & Electric Company, the remaining forty-nine (49) per cent. being still owned by said Ohio Fuel Supply Company; but that said predecessor was incorporated under a charter issued by the State of West Virginia, dated March 7, 1903, filed herewith, with various certificates thereto attached, marked "Original Charter and Certificates," for the legal purpose and with the powers therein set forth. That, as a part of the transaction in the year 1909 by which the said Ohio Fuel Supply Company disposed of fifty-one (51) per cent. of the capital stock of said plaintiff's predecessor, it entered into the contract with the said plaintiff's predecessor to purchase from it the gas which has since been and is now being sold by the plaintiff and its said predecessor to said Ohio Fuel Supply Company, as in the bill set forth.

88 (b) That the plaintiff owns or holds gas leasehold rights in approximately 600,000 acres of land situate in the Counties of Roane, Jackson, Clay, Kanawha, Putnam, Cabell, Wayne, Mingo, Boone and Logan, in the State of West Virginia, and has pipe lines for the transportation or distribution of gas in each of said named counties except the County of Boone, and also in the Counties of Calhoun and Gilmer, in the State of West Virginia.

That in the section of each of said Counties where natural gas is produced the plaintiff is in competition with others in the acquisition of gas rights and leases and the production of gas.

(c) That in each of the Counties aforesaid in which the plaintiff's pipe lines are situate, it transports, delivers and sells gas to domestic consumers along its lines and, to a less extent, to industrial and manufacturing consumers and to the inhabitants of certain of the cities, towns and villages therein, and in no case of such sale of gas to inhabitants of said cities, towns and villages is the plaintiff company in competition with any other company engaged in the sale of gas, except in the City of Huntington, Cabell County, West Virginia, wherein it sells gas in competition with the Huntington Development and Gas Company, and in the town of Spencer, Roane County, West Virginia, wherein the plaintiff sells gas in competition with one Godfrey L. Cabot, and in the suburbs of the City of Charleston, in which suburbs the plaintiff sells gas in competition with the Charleston-Dunbar Natural Gas Company, but it is further stipulated that there are other persons and corporations engaged in the sale or distribution of gas on a comparatively small scale in sections of certain of said Counties which are not supplied by the plaintiff.

In each of the incorporated cities or towns in West Virginia wherein the plaintiff sells its gas, it does so under franchises
89 granted it by such cities or towns, except in the incorporated town of South Charleston, Kanawha County, West Virginia.

2. For the purposes of this suit, it is agreed that the amount of natural gas produced by the plaintiff from wells upon lands situate in West Virginia and Kentucky, the amount of gas purchased by said plaintiff from others during the year ending July 1, 1919, and the amount sold or disposed of within and without the State of West Virginia, as alleged in Paragraph V of the plaintiff's bill herein, may be treated and considered as correct, but without prejudice to the right of the State of West Virginia, the State Tax Commissioner thereof, or any other proper officer or department of said State, to verify or correct the amount as stated in such paragraph, for the purpose of assessing taxes against said plaintiff, so far as such amounts may be in any way material for such purpose.

3. It is further agreed, with reference to the contracts referred to in Paragraph V of the plaintiff's bill of complaint and in Paragraph V of the defendants' answer thereto, between said plaintiff and the Ohio Fuel Supply Company, Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, respectively, that said contracts contain provisions, in substance and effect, as follows:

Said contracts with the Ohio Fuel Supply Company and the Columbia Gas & Electric Company fix a price to be paid for the gas delivered thereunder, respectively, based upon the cost of producing such gas, and the effect of such provision is to enable the plaintiff to treat any lawful taxes levied upon its property, or upon the privilege or franchise of conducting its business, as a part of the cost of producing such gas and thereby to have reimbursed to it by such purchasing companies the entire amount of any such
90 lawful tax, in so far as the same is apportionable to the gas sold under such contract.

It is further agreed that said Columbia Gas & Electric Company and the Ohio Fuel Supply Company are, and have been at all times since the incorporation of the plaintiff on February 1, 1916, the owners of all of the capital stock of the plaintiff, except seven shares of said capital stock owned by the directors of the plaintiff as qualifying shares, said remaining stock being owned fifty-one (51) per cent. by the Columbia Gas & Electric Company and forty-nine (49) per cent. by the Ohio Fuel Supply Company.

That as to said contracts with the Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, there is a provision contained in each, the substance of which is that in case any lawful tax or assessment should be imposed after the date of said contracts, to-wit, the 25th day of August, 1916, upon natural gas in any manner so as to constitute, in effect, a charge upon gas delivered thereunder, the amount paid on account of such tax or assessment should be borne one-half by the plaintiff and one-half by said purchasing companies, respectively, in so far as such tax affects, relates to or is apportionable to the amount of gas delivered under said contracts, respectively, and in the event that the plaintiff should be required to pay the same, then one-half of the amount thereof should be refunded by said companies, respectively, to the plaintiff, in addition to the prices to be paid for gas in said contracts set forth.

It is further agreed, with reference to the gas sold and delivered to said four Companies under the contracts aforesaid, that all of the gas delivered at any time to the Ohio Fuel Supply Company under the contract between it and the plaintiff, has been and continues to be, by said Ohio Fuel Supply Company, transported to points outside the State of West Virginia, no part thereof being sold by said

Ohio Fuel Supply Company in the State of West Virginia or consumed in said last mentioned State; that of the gas sold and delivered by the plaintiff to the Columbia Gas & Electric Company, at least ninety-nine (99) per cent. thereof has been, and continues to be, by the latter Company, transported outside the State of West Virginia and sold to consumers outside the said State, not more than one (1) per cent. of the gas so delivered to it during any year having been sold by said Columbia Gas & Electric Company in the State of West Virginia or consumed in said State of West Virginia; that of the gas sold by the plaintiff to Pittsburgh & West Virginia Gas Company, at least eighty-eight (88) per cent. thereof has been, and continues to be, by the latter Company, transported outside the State of West Virginia and sold to consumers outside the said State, not more than twelve (12) per cent. of the gas so delivered to it during any year having been sold by said Pittsburgh & West Virginia Gas Company in the State of West Virginia or consumed in said State of West Virginia; that of the gas sold by the plaintiff to Hope Natural Gas Company, at least sixty-seven (67) per cent. thereof has been, and continues to be, by the latter Company, transported outside the State of West Virginia and sold to consumers outside the said State, not more than thirty-three (33) per cent. of the gas so delivered to it during any year having been sold by said Hope Natural Gas Company in the State of West Virginia or

consumed in said State of West Virginia. The foregoing statements and estimates are based upon the assumption that the same proportion of gas purchased from the plaintiff as of gas produced by said last mentioned three Companies, respectively, or purchased by them from others, goes outside the State of West Virginia, but all of said gas so sold by the plaintiff to said Companies, and each of them, is actually by them commingled and mixed with other gas produced or bought by them while in the State of West Virginia, and the gas so sold by each of said Companies is from the mass so commingled in West Virginia. Each of said Companies produces and buys gas from sources other than the plaintiff, and each is a public service utility corporation under the laws of West Virginia.

It is further agreed that the Ohio Fuel Supply Company transports the gas purchased by it from the plaintiff a distance of less than ten miles in the State of West Virginia, and that the entire system of pipe lines owned, operated or controlled by said Ohio Fuel Supply Company in the State of West Virginia is less than ten miles in length; but each of the remaining three Companies referred to in this paragraph as purchasers of gas from the plaintiff, namely, Pittsburgh & West Virginia Gas Company, Hope Natural Gas Company and Columbia Gas & Electric Company, is the owner and operator of a separate system of pipe lines within the State of West Virginia which is more than ten miles in length, and that substantially all of the gas sold and delivered by the plaintiff to each of said three last named Companies is by them, respectively, transported a distance of more than ten miles within the State of West Virginia.

4. With reference to the allegations in the fifth paragraph of the bill of complaint, and the averments in reply thereto in the fifth paragraph of the answer of the defendants, relating to the amount of gas sold by the plaintiff during the year ending July 1, 1919, to consumers in the State of West Virginia, it is agreed that of the total quantity so sold to such consumers in said year, amounting to 11,590,650 M cubic feet, a comparatively small part of said total quantity so sold to consumers in the State of West Virginia was produced in the State of Kentucky and transported by the plaintiff into the State of West Virginia. The exact quantity so produced in the State of Kentucky and transported to consumers in the State of West Virginia is not known, since there was no measurement thereof, but it is agreed that the same was less than two, but more than one per cent. of the entire quantity sold to consumers in said State of West Virginia, during said year, by the plaintiff, and that at least ninety-eight per cent. of said total quantity sold by the plaintiff to consumers in the State of West Virginia, during said year, was produced from lands located in the State of West Virginia.

5. With reference to the allegations in the paragraph numbered XII of the bill of complaint and the averments in reply thereto in the paragraph numbered XII of the defendants' answer, it is agreed

that there are approximately the number of persons, firms and corporations mentioned in said paragraph of the bill engaged in the production of natural gas in the State of West Virginia, who, together, produce approximately one-fourth of the entire quantity of natural gas produced in said State, no one of which owns, operates or controls a system of pipe lines ten miles in length or transports gas as much as ten miles. That the pipe lines operated by such producers are generally only such as are required for gathering or assembling the gas produced from the various wells operated by them, at some central point for sale to some other company equipped for transportation thereof to distant localities, but that each of said producers does transport natural gas by means of pipe lines less than ten miles in length, as incidental to the production and sale thereof as stated in the answer of the defendants.

6. The business conducted by the plaintiff in the production, purchase, transportation, and sale of natural gas remains now, and it is contemplated will remain to be, in the future, of the same general character as during the year ending July 1, 1919; that is to say, that the said plaintiff has been, since July 1, 1919, and it is contemplated that it will, in the future, continue to transport and sell
94 the gas produced and purchased by it in the States of West Virginia and Kentucky, partly to consumers of such gas in the States in which it so produced and partly to consumers in other States; partly to the Columbia Gas & Electric Company, Ohio Fuel Supply Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, by delivering the same to such Companies in the State of West Virginia for transportation and sale by such latter Companies chiefly to consumers outside the State of West Virginia; partly to consumers in Kentucky and Ohio connected directly with the lines of the plaintiff leading from the State where the gas is produced to another State; and partly for delivery by the plaintiff, through its pipe lines leading outside the State where the gas is produced, to Portsmouth Gas Company, Louisville Gas & Electric Company and Central Kentucky Natural Gas Company, for further transportation by such last mentioned Companies for sale to consumers outside the State of West Virginia, all in substantially the same proportions as during said year ending July 1, 1919. It is further understood, in connection with the statement of facts contained in the paragraph (in order to save delay in the amendment of its bill by the plaintiff), that this stipulation with reference thereto shall be of the same force and effect as if the said facts had been averred in the bill of complaint and not denied by the answer of the defendants herein.

7. It is further agreed that the plaintiff is a public utility corporation under the laws of West Virginia, by reason of its charter and the character of business in which it is engaged, and is subject to the laws of said State as such corporation.

8. Nothing contained in the foregoing stipulation shall deprive the plaintiff of the benefit of any allegations of fact contained in its bill, where such facts are not controverted by the answer of the

95 defendants herein, and it is agreed that, as to the facts herein stipulated, they shall be given the same full force and effect as if the plaintiff had replied generally to the defendants' answer.

UNITED FUEL GAS COMPANY,
By MALCOLM JACKSON,
R. G. ALTIZER,
Counsel.
W. S. HALLANAN,
State Tax Commissioner.
E. T. ENGLAND,
Attorney General,
By S. B. AVIS,
FRED O. BLUE,
W. G. MATHEWS,
Counsel.

(Endorsed on back:) (16). No. 5433. United Fuel Gas Company vs. Walter S. Hallanan, State Tax Commissioner, et al. In Equity. Stipulation. Filed Jan. 27, 1920, in Kanawha Circuit Court Clerk's Office. A. P. Hudson, Clerk.

96 STATE OF WEST VIRGINIA:

Certificate of Incorporation.

I, Wm. M. O. Dawson, Secretary of State of the State of West Virginia, do hereby certify that an Agreement duly acknowledged and accompanied by the proper affidavits, has been this day delivered to me, which agreement is in the words and figures following:

I. The undersigned agree to become a corporation by the name of United Fuel Gas Company.

II. The principal place of business of said corporation shall be located at New Martinsville, in the County of Wetzel and State of West Virginia, the location as to Street and number not yet being fixed. Said corporation will have no chief works, but its operations and works shall be within the State of West Virginia.

III. The objects and purposes for which this corporation is formed are as follows:

To do all kinds of mining, manufacturing and trading business authorized by the laws of the State of West Virginia; to search for, mine, bore, dig and drill, or otherwise obtain from the earth, petroleum, rock or carbon oils, natural gas, coal, or any other minerals, and to purchase, take, hold, pledge, mortgage, sell, store, refine and transport, and otherwise trade in oil, gas, coal, or any other minerals or substance, in crude or refined states; to manufacture gas, and manufacture and refine and generally prepare for market, any minerals or other substances, and the products and by-products thereof; to construct, purchase, own, operate, maintain, pledge, mortgage, sell, lease or license to use gas works, refineries,

pipe lines, tram ways, and all other instruments or vehicles for manufacturing or transporting by land or water, but this corporation shall not construct or maintain a railroad within the State of West Virginia; to construct and maintain lines of tubing or pipe for the transportation of oils and gas, or either of them, for the public generally as well as for the use of said corporation; to transport such oil and gas, or either of them, by means of such pipes or otherwise; and generally to buy, sell, exchange, lease, acquire and deal in mines, minerals, oil, gas, rights and claims and in the above specified materials and products, and to conduct all business appurtenant thereto.

To buy, sell, lease and improve lands; to construct houses, refineries, gas works and other structures, docks and piers; to construct and maintain and operate telegraph and telephone lines and lines for conducting electricity; to enter into and carry out contracts of all kinds pertaining to the business herein specified; to hold, purchase, mortgage and convey real estate and personal property outside the State of West Virginia, and with full power and for the purpose of doing also all other things proper, necessary, convenient or incident to the powers and purposes above specifically expressed.

IV. The amount of the total authorized capital stock of said corporation shall be one million (\$1,000,000) dollars, which shall be divided into forty thousand (40,000) shares of the par value of twenty-five (\$25.) dollars each; of which authorized capital stock the amount of five hundred (\$500) dollars has been subscribed, and the amount of five hundred (\$500) dollars has been paid.

V. The names and post office addresses of the incorporators and the number of shares of stock subscribed for by each, are as follows:

Name.	Post office address.	Total No. of shares.
H. B. Myer....	1027 Carnegie Bldg., Pittsburgh, Pa....	4
R. T. Rossell...	1027 Carnegie Bldg., Pittsburgh, Pa....	4
J. G. Frazer...	1027 Carnegie Bldg., Pittsburgh, Pa....	4
J. P. Lafferty..	1027 Carnegie Bldg., Pittsburgh, Pa....	4
D. A. Reed....	1027 Carnegie Bldg., Pittsburgh, Pa....	4

VI. This corporation is to expire on the 23rd day of February, A. D. 1953.

VII. The said corporation shall have power, by the consent of the holders of a majority of shares of its stock, ascertained by a vote of its stockholders regularly had, to subscribe for, purchase, take, hold, pledge, mortgage, sell, exchange and otherwise deal in shares of capital stock, bonds, or other evidences of ownership or indebtedness of any other corporation or joint stock company, whether incorporated under the laws of the State of West Virginia or of any other government, and to exercise all the privileges of ownership therein, including voting upon the stock so held, or to become surety or guarantor for the debt or default of said corporation.

Given under our hands this 2nd day of March, A. D. 1903.

H. B. MYER.
R. T. ROSSELL.
J. G. FRAZER.
J. P. LAFFERTY.
D. A. REED.

Wherefore, The corporators named in the said Agreement and who have signed the same, and their successors and assigns, are hereby declared to be from this date until the Twenty Third day of February Nineteen Hundred and Fifty Three a Corporation 99 by the name and for the purposes set forth in said agreement.

Given under my hand and the Great Seal of the said State, at the City of Charleston, this Seventh day of March Nineteen Hundred and Three.

[SEAL.]

WM. M. O. DAWSON,
Secretary of State.

STATE OF WEST VIRGINIA:

Certificate.

I, Wm. M. O. Dawson, Secretary of State of the State of West Virginia, do hereby certify that R. T. Rossell, President of the United Fuel Gas Company, a corporation created and organized under the laws of the State of West Virginia, has certified to me under his signature and the corporate seal of said corporation, that at a meeting of the stockholders of said corporation, regularly held in accordance with the requirements of the laws of said State, at the branch office thereof, in the City of Pittsburgh, State of Pennsylvania, on the 31st day of May, 1904, at which meeting all of the stock of such corporation being represented by the holders thereof in person or by proxy and voting for the following resolution, the same was duly and regularly adopted and passed, to wit:

"Resolved, that the authorized capital stock of the United Fuel Gas Company be reduced from forty thousand (40,000) shares of the par value of twenty-five (\$25) dollars each, to one thousand (1,000) shares of the par value of twenty-five (\$25) dollars each, so that the authorized capital stock of said corporation shall hereafter be twenty-five thousand (\$25,000) dollars instead of 100 one million (\$1,000,000) dollars as heretofore."

Wherefore, I do declare said decrease of the authorized capital stock as set forth in the foregoing resolution authorized by law.

Given under my hand and the Great Seal of the said State, at the City of Charleston, this Eighteenth day of July 1904.

[G. S.]

WM. M. O. DAWSON,
Secretary of State.

STATE OF WEST VIRGINIA:

Certificate.

I, C. W. Swisher, Secretary of State of the State of West Virginia, hereby certify that Geo. W. Crawford, President of the United Fuel Gas Company, a corporation created and organized under the laws of the State of West Virginia, has certified to me under his signature and the corporate seal of said corporation, that at a meeting of the stockholders of said corporation, regularly held in accordance with the requirements of the laws of said State, at the office thereof, in Pittsburgh, Pennsylvania, on the 16th day of January, 1908, at which meeting all of the stock of such corporation being represented by the holders thereof in person or by proxy and voting for the following resolution, the same was duly and regularly adopted and passed, to wit:

"Resolved, that the authorized capital stock of the United Fuel Gas Company be increased from one thousand shares of the par value of twenty-five dollars each to ten thousand shares of the par value of twenty-five dollars each, so that the authorized capital stock of said corporation shall hereafter be two hundred and fifty
101 thousand dollars instead of twenty-five thousand dollars as heretofore."

Wherefore, I do declare said increase of the authorized capital stock as set forth in the foregoing resolution authorized by law.

Given under my hand and the Great Seal of the said State, at the City of Charleston, this Tenth day of February 1908.

[G. S.]

C. W. SWISHER,
Secretary of State.

STATE OF WEST VIRGINIA:

Certificate.

I, Stuart F. Reed, Secretary of State of the State of West Virginia, hereby certify that George W. Crawford, President of the United Fuel Gas Company, a corporation created and organized under the laws of the State of West Virginia, has certified to me under his signature and the corporate seal of said corporation, that, at a meeting of the stockholders of said corporation, regularly held in accordance with the requirements of the laws of said State, at the office thereof, in the City of Pittsburgh, State of Pennsylvania, on the 3rd day of September, 1909, at which meeting a majority of stock of such corporation being represented by the holders thereof in person or by proxy and voting for the following resolution, the same was duly and regularly adopted and passed, to wit:

"Resolved, that the authorized capital stock of this, the United Fuel Gas Company and the par value of the shares thereof and the same are hereby increased from ten thousand shares of the par value of twenty-five dollars each to one hundred thousand shares of the par value of one hundred dollars each, so that the authorized

102 capital stock of said corporation shall hereafter be ten million dollars instead of two hundred and fifty thousand dollars as heretofore."

Wherefore, I do declare said change in the par value and number of shares of stock as set forth in the foregoing resolution, authorized by law, and that the authorized capital stock of said corporation is thereby increased and shall hereafter be Ten Million Dollars.

Given under my hand and the Great Seal of the said State, at the City of Charleston, this Tenth day of September 1909.

[G. S.]

STUART F. REED,
Secretary of State.

STATE OF WEST VIRGINIA:

Certificate.

I, Stuart F. Reed, Secretary of State of the State of West Virginia, hereby certify that F. W. Crawford, President of the United Fuel Gas Company, a corporation created and organized under the laws of the State of West Virginia, has certified to me under his signature and the corporate seal of said corporation, that, at a meeting of the stockholders of said corporation, regularly held in accordance with the requirements of the laws of said State, at the branch office thereof, in the City of Pittsburgh, State of Pennsylvania, on the 23rd day of September, 1912, at which meeting a majority of stock of such corporation being represented by the holders thereof in person or by proxy and voting for the following resolution, the same was duly and regularly adopted and passed, to wit:

"Resolved that the principal office of the United Fuel Gas Company, a corporation created, organized and existing under the laws of the State of West Virginia, be and the same is hereby
103 changed from the town of New Martinsville, in the County of Wetzel and State of West Virginia, to the City of Pittsburgh, in the County of Allegheny in the State of Pennsylvania."

Wherefore, I do declare that the principal office or place of business of said corporation shall hereafter be at the City of Pittsburgh, in the County of Allegheny and State of Pennsylvania.

Given under my hand and the Great Seal of the said State, at the City of Charleston, this Eighteenth day of October 1912.

[G. S.]

STUART F. REED,
Secretary of State.

STATE OF WEST VIRGINIA:

Certificate.

I, Stuart F. Reed, Secretary of State of the State of West Virginia, hereby certify that F. W. Crawford, President of United Fuel Gas Company, a corporation created and organized under the laws of the State of West Virginia, has certified to me under his signature and the corporate seal of said corporation, that, at a meeting of the stockholders of said corporation, regularly held in accordance with the

requirements of the laws of said State, at the office thereof in the City of Pittsburgh, Pennsylvania, on the 13th day of January, 1916, at which meeting a majority of stock of such corporation being represented by the holders thereof in person or by proxy and voting for the following resolution, the same was duly and regularly adopted and passed, to wit:

104 "Resolved that the name of this corporation be changed from the United Fuel Gas Company, its present name, to United Gas Company; and that this resolution be certified under the common seal and signature of the President of this corporation to the Secretary of State of the State of West Virginia, in the manner required by the laws of said State, so that after the same shall have been so certified and the said Secretary of State shall have issued his certificate of such change, this corporation shall be known as United Gas Company instead of United Fuel Gas Company."

Wherefore, I do declare said change of name to be authorized by law, and that said corporation shall hereafter be known by the name of United Gas Company.

Given under my hand and the Great Seal of the said State, at the City of Charleston, this Fourteenth day of March 1916.

[G. S.]

STUART F. REED,
Secretary of State.

(Certificate under Section 906, Revised Statutes of the United States.)

UNITED STATES OF AMERICA,
State of West Virginia:

Office of Secretary of State.

I, Houston G. Young, Secretary of State of the State of West Virginia, being the officer who, under the constitution and laws of said State, is authorized to issue certificates of incorporation of all companies incorporated under the laws thereof, and being the officer authorized to issue certificates certifying changes in and amendments to such certificates of incorporation, and being the officer who is
105 the keeper of all the records and papers relating to the creation of such incorporated companies and of changes in and amendments to said certificates of incorporation, including the powers of attorney of such incorporated companies, appointing a resident agent or attorney in said State, and of the reports of such incorporated companies, and being the officer authorized to authenticate exemplifications of the same, do hereby certify that the fore-ing and annexed instrument is an exemplified copy, carefully compared by me with the original record now in my official custody as said Secretary of State, and found to be a true and correct copy of the certificate of incorporation of United Gas Company, dated the 7th day of March, 1903, with all amendments and additions thereto, and recorded in the records of Corporations of my said office; and that said exemplification is in due form and made by me as the proper officer, and is

entitled to have full faith and credit given it in every court and office within the United States.

In testimony whereof I have hereunto attached my official signature and the Great Seal of the State of West Virginia, at the Capitol in the City of Charleston, this 26th day of November, 1919.

[SEAL.]

HOUSTON G. YOUNG,
Secretary of State.

Endorsed on back: No. 5433. (17.) State of West Virginia. Certified Copy of Certificate of Incorporation of "Exhibit 106 Original Charter and Certificates" United Gas Company filed with agreed Statement of Facts in case of United Fuel Gas Co. v. Hallanan, State Tax Com'r & Another. Original dated March 7, 1903. Circuit Court Kanawha County, West Virginia. Filed Jan. 27, 1920, in Kanawha Circuit Court Clerk's Office. A. P. Hudson, Clerk.

In Chancery.

No. 5433.

UNITED FUEL GAS CO.

v.

WALTER S. HALLANAN, State Tax Commissioner, et als.

Pursuant to the order setting this case for final hearing and submission on January 27, 1920, the parties hereto appeared by their respective counsel and filed a stipulation and agreed statement of facts, together with an exhibit therein described and identified, and this case having come on to be heard and having now been fully heard upon the plaintiff's bill of complaint and exhibits filed therewith, the joint and separate demurrer and answer of said defendants, and the exhibits with said answer, said demurrer duly set down for hearing and argument, said agreed stipulation of facts and exhibits therewith, but without replication either general or
107 special to said answer, upon the plaintiff's motion for an injunction as prayed for in its bill, and argument of counsel, this case is now Finally submitted to the Court for consideration, decision and decree, and the Court takes time to consider its judgment.

Endorsed on back: (18.) United Fuel Gas Co. v. Walter S. Hallanan, State Tax Com'r and another. Order Submitting. Enter. H. D. Rummel, Judge. Entered in Chy. Order Book Jan. 31, 1920, No. 42, Page 375.

In Equity.

No. 5433.

UNITED FUEL GAS COMPANY, a Corporation,

vs.

WALTER S. HALLANAN, as Tax Commissioner of the State of West Virginia, and E. T. England, as Attorney General of the State of West Virginia.

108 This day this cause came on to be finally heard upon the papers formerly read, and it is now adjudged, ordered and decreed that the Act of the Legislature of the State of West Virginia, passed at the Extraordinary Session of 1919, entitled, "An act to levy a privilege tax on any person, firm or corporation engaged in the transportation of crude oil or petroleum, or the distillates thereof, or of natural gas, by means of pipe lines, authorizing the state tax commissioner to provide rules and regulations for the collection of such tax, and defining the duties of the state tax commissioner," referred to in the bill of complaint, is unconstitutional and void as against the plaintiff and the business conducted by it as set forth in its bill of complaint, for the reasons set forth in the following memorandum:

"Memorandum by the Court.

RUMMEL, Judge:

This injunction suit has been heard and submitted with the accompanying cause of Eureka Pipe Line Company vs. Hallanan et al., and has been decided by this court.

It appears from the pleadings and from a stipulation filed in this cause that the plaintiff is engaged in gathering natural gas in this state, the greater part of which it produces but some of which it purchases from other producers, and in transporting and distributing such gas to consumers thereof in this and other states. The company also handles a small quantity of gas produced and purchased by it in the State of Kentucky. The entire amount of gas so handled by the plaintiff in the year ending July 1, 1919, was 54,973,588 M cubic feet, of which 1,243,797 M cubic feet was produced or purchased in Kentucky and the remainder in this state.

Of the entire amount of gas so handled by the plaintiff in said year, a little more than 21,000,000 M cubic feet was sold by the
109 plaintiff direct to consumers thereof,—11,590,650 M cubic feet in West Virginia, 6,971,446 M cubic feet in Kentucky, and 3,229,358 M cubic feet in Ohio. The remainder of the 54,973,588 M cubic feet of gas handled in said year was sold by the plaintiff to other wholesale concerns transporting and dealing in natural gas, for transportation to points outside this state. It thus appears that approximately 42,000,000 M cubic feet of the above total was directly or indirectly sold and transported by the plaintiff out of

West Virginia. It may be noted that some of these sales and deliveries to wholesale concerns are made in this state and some are made outside the state.

There can be no question that the major part of the gas handled by this company in the conduct of its business is moving in interstate commerce. The attack made upon the validity of the Transportation Tax Act, Chapter 5, Acts of 1919, extraordinary session, as constituting a burden upon interstate commerce, in our judgment is as well sustained in the case at bar as in the case of Eureka Pipe Line Company vs. Hallanan et al., mentioned above. We refer to the memorandum just filed in that case for a discussion of the principle upon which our decision in both cases rests.

In our opinion, a further ground of invalidity of this statute, as applied to the transportation of natural gas, is its indefiniteness in failing to specify the pressure at which the gas shall be measured for the purpose of computing the tax. It is shown that natural gas is handled at greatly varying pressures, and may be gauged or measured at either its high or low pressure; hence, it would be impossible to ascertain under this statute the exact amount of the tax upon the transportation of gas, as contemplated by the legislature, unless the statute be construed to vest the State Tax Commissioner or other officers enforcing the law, with authority to determine
110 the basis of measurement and to fix some standard pressure at which all gas transported should be gauged for the purpose of computing the tax imposed by this statute. Such a construction as this, however, would in our judgment render the enactment invalid as delegating legislative power to an executive or ministerial officer.

For the reasons herein mentioned, and set out in full in the memorandum filed in the case of Eureka Pipe Line Company vs. Hallanan et al., an injunction will be awarded and perpetuated in this cause as prayed in the bill."

It is therefore further adjudged, ordered and decreed that the plaintiff is entitled to the injunction prayed in its bill of complaint against the defendants, and the defendant Walter S. Hallanan, as Tax Commissioner of the State of West Virginia, is hereby perpetually inhibited and enjoined from enforcing said Act of the Legislature, or any of the terms thereof against the plaintiff herein, and the said defendant Hallanan and the defendant E. T. England, as Attorney General of the State of West Virginia, and all persons acting under the direction or control of them, or either of them, are particularly inhibited and enjoined from requiring the plaintiff to make a return or report in writing to the State Tax Commissioner of the natural gas transported by the plaintiff, by means of pipe lines, in the State of West Virginia, or requiring the payment by the plaintiff of the tax prescribed by said statute upon the privilege of transporting natural gas, and from enforcing the terms of said statute imposing fines and penalties for continuing the conduct of such business without securing the license mentioned in said statute.

111 Endorsed on back: (19.) United Fuel Gas Co vs. Walter S. Hallanan, Tax Comr. et al. Chy. Order. Enter. H. D. Rummel, Judge. Entered in Chy. Order Book Sep. 14, 1920, No. 43, Page 225. O. K. as to Form. W. G. Mathews, of Counsel for Defts.

STATE OF WEST VIRGINIA,
Kanawha County, ss:

I, A. P. Hudson, Clerk of the Circuit Court for said County and in said State, do hereby certify that the foregoing is the complete record in the Chancery cause of United Fuel Gas Co. vs. Walter S. Hallanan, Tax Commissioner et al.

Given under my hand and the seal of said Court this 30th day of September, 1920.

A. P. HUDSON,
Clerk Kanawha Circuit Court.

112 & 113 Endorsed on back as follows: Certificate in the case of United Fuel Gas Company, vs. Walter S. Hallanan, State Tax Commissioner et al. In Chancery. No. 5433. (Printed October 29, 1920.) (Printer's fee for petition, record, inserts, index and cover, & — \$89.25.

114 Pleas Before the Supreme Court of Appeals of the State of West Virginia.

Be it remembered, that a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on Friday, the 1st day of October, 1920, the following order was made and entered, to-wit:

Absent: Judge Williams.

UNITED FUEL GAS COMPANY

VS.

WALTER S. HALLANAN, State Tax Commissioner, et al.

This day came Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of said State, by E. T. England, Attorney General, Frank Lively, Assistant to the Attorney General, John T. Simms, S. B. Avis, W. G. Mathews and F. O. Blue, their attorneys, and presented to the Court a petition praying for an appeal from a decree of the Circuit Court of Kanawha County, pronounced on the 14th day of September, 1920, in a cause in which the United Fuel Gas Company was plaintiff and said petitioners were defendants, with a record of the decree aforesaid accompanying the petition, which being seen and inspected by the Court, the appeal prayed for is allowed, but the same is not to take effect until the petitioners, one of them or some person or per-

sons for them, shall have given, before the Clerk of the Circuit Court of Kanawha County, bond with good personal security in the penalty of One Thousand Dollars, conditioned according to law.

And thereupon the appellants, by counsel, asked leave of the Court to make a motion to reserve the decree aforesaid, and in the event such leave be granted, that the matters arising upon said motion be heard upon the original record of said decree: upon consideration whereof, the Court is of opinion to and hereby doth

grant leave to make such motion, and doth order that the
 115 matters at issue arising thereon be heard upon said original record, and doth fix Monday, the 8th day of November, 1920, for the hearing thereof providing notice be given and returned to the office of the Clerk of this Court in accordance with the provisions of section 1 of Rule VIII of the rules of this Court.

The petition aforesaid together with the notice of the motion to reverse said decree are in the words and figures following:

116 In the Supreme Court of Appeals of West Virginia, Charleston

No. 4261.

UNITED FUEL GAS COMPANY, Plaintiff Below, Appellee,

vs.

WALTER S. HALLANAN, State Tax Commissioner, et al., Defendants
 Below, Appellants.

Appeal Allowed October 1, 1920, from Decree Pronounced September
 14, 1920.

From the Circuit Court of Kanawha County.

Petition.

In the Supreme Court of Appeals of West Virginia.

In Equity.

UNITED FUEL GAS COMPANY, a Corporation, Plaintiff,

vs.

117 WALTER S. HALLANAN, as Tax Commissioner of the State of West Virginia, and E. T. England, as Attorney General of the State of West Virginia, Defendants.

In the Circuit Court of Kanawha County.

To the Honorable the Judges of the Supreme Court of Appeals of West Virginia:

Your petitioners, Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of

the State of West Virginia, respectfully represent that they are aggrieved by a final decree pronounced and entered by the Circuit Court of Kanawha County, West Virginia, on the 14th day of September, 1920, in a certain suit in equity therein pending, wherein the Eureka Pipe Line Company, a Corporation, was plaintiff and your petitioners were defendants.

The original papers, record and attested copy of the said final decree, all duly certified as required by law are presented herewith.

Your petitioners assign the following errors to their prejudice:

First. The Court below erred in finding and decreeing that the Transportation Tax Act, being Chapter 5, of the Acts of the Legislature of the State of West Virginia, Extraordinary Session held in 1919, entitled, "An act to levy a privilege tax on any person, firm or corporation engaged in the transportation of crude oil or petroleum, or the distillates thereof, or of natural gas, by means of pipe lines, authorizing the state tax commissioner to provide rules and regulations for the collection of such tax, and defining the duties of the state tax commissioner," is unconstitutional and void as against the plaintiff and the business conducted by it as set forth in the plaintiff's bill of complaint.

118 Second. The Court below erred in decreeing that the plaintiff is entitled to the injunction prayed for in its bill of complaint against your petitioner.

Third. The Court below erred in perpetually inhibiting and enjoined your petitioners, and each of them, from enforcing the said Transportation Tax Act, or any of the terms thereof against the plaintiff, the United Fuel Gas Company, and from requiring it to make any return or report to your petitioners, Walter S. Hallanan, State Tax Commissioner, of the amount of natural gas transported by the plaintiff, by means of pipe lines, in the State of West Virginia, and from enforcing the terms of the said statute imposing fines and penalties for continuing the conduct of such business without securing the license mentioned in said statute.

And for these and other errors apparent upon the face of the record, or that may be hereafter assigned in argument, your petitioners pray for an appeal from said decree of September 14, 1920.

WALTER S. HALLANAN,

State Tax Commissioner of West Virginia;

E. T. ENGLAND,

Attorney General of West Virginia,

Petitioners,

By THEIR COUNSEL,

E. T. ENGLAND,

Attorney General of West Virginia;

FRANK LIVELY,

JOHN T. SIMMS,

S. B. AVIS,

W. G. MATHEWS,

F. O. BLUE,

Their Counsel.

119 We, S. B. Avis, W. G. Mathews and Fred O. Blue, attorneys-at-law practicing in the Supreme Court of Appeals of West Virginia, do certify, that in our opinion there is error in the decree complained of in the above petition and that the same should be reviewed by said Court.

Given under our hands this 30th day of September, 1920.

S. B. AVIS.

W. G. MATHEWS.

FRED O. BLUE.

STATE OF WEST VIRGINIA, *To-wit:*

The appeal prayed for in the foregoing petition was allowed in Court at Charleston on the 1st day of October, 1920. Bond is required in the penalty of \$1,000.00, conditioned according to law.

Attest:

WM. B. MATHEWS,

Clerk Supreme Court of Appeals.

120 To the United Fuel Gas Company, a corporation:

You will please take notice that the Supreme Court of Appeals of the State of West Virginia on the 1st day of October, 1920, allowed and awarded to the undersigned, Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the State of West Virginia, an appeal from the final decree of the Circuit Court of Kanawha County, West Virginia, pronounced and entered on September 14, 1920, in that certain suit in chancery pending in said Circuit Court wherein you, United Fuel Gas Company, are plaintiff, and said Walter S. Hallanan, as State Tax Commissioner, and E. T. England, as Attorney General of West Virginia, are defendants.

You will also take notice that, pursuant to leave of the Court duly granted, the undersigned will on the 8th day of November, 1920, or as soon thereafter as such motion can be heard, move said Supreme Court of Appeals, at Charleston, West Virginia, to reverse said decree of said Circuit Court of Kanawha County West Virginia, of September 14, 1920, pursuant to Section 26 of Chapter 135 of the Code of West Virginia, as amended by Chapter 69 of the Acts of the Legislature of 1915, and in accordance with Rule VIII of the Rules of Practice of said Supreme Court of Appeals.

You will further take notice that such motion to reverse will be made upon the following grounds:

First. That said Circuit Court of Kanawha County erred in said decree of September 14, 1920, in adjudging and decreeing that the Act of the Legislature of the State of West Virginia, passed at the Extraordinary Session of 1919 entitled "An Act to levy a privilege tax on any person, firm or corporation engaged in the transportation of crude oil or petroleum or the distillates thereof, or of natural gas, by means of pipe lines, authorizing the State Tax Commissioner to provide rules and regulations for the collection of such tax, and de-

fining the duties of the State Tax Commissioner," is unconstitutional and void as against the plaintiff in said suit and the business conducted by it as set fourth in its bill of complaint filed therein.

121 Second. That said Circuit Court erred in said decree in adjudging and decreeing that said plaintiff was entitled to the injunction prayed in its bill of complaint against the defendants, Walter S. Hallanan, Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the State of West Virginia, and all persons acting under the direction or control of them, or either of them, and in enjoining said defendants from enforcing said Act of the Legislature, or any of its terms, against said plaintiff and in enjoining said defendants from requiring said plaintiff to make a return in writing to the State Tax Commissioner of the natural gas transported by said plaintiff by means of pipe lines in the State of West Virginia, or requiring payment by said plaintiff of the tax prescribed by said statute upon the privilege of transporting natural gas, and from enforcing the terms of said statute imposing fines and penalties for continuing the conduct of such business without securing the license mentioned in said statute.

Third. That said Circuit Court erred in and by said decree in holding that the tax imposed upon the plaintiff by statute, Chapter 5, Acts of 1919, Extraordinary Session of the Legislature, constituted a burden upon interstate commerce.

Fourth. That said Circuit Court erred in finding and holding in said decree that said statute was invalid as applied to the transportation of natural gas because of any alleged indefiniteness in said statute in failing to specify the pressure at which natural gas transported by it should be measured for the purpose of computing the tax prescribed thereby.

Fifth. That said Circuit Court erred in said decree in that it did not find and hold said statute, Chapter 5, Acts of the Legislature, Extraordinary Session 1919, to be in all respects constitutional and valid, and in failing to dismiss the plaintiff's bill upon said final hearing and by said final decree, and in granting the plaintiff the relief prayed for in its said bill of complaint, or any relief.

122 Respectfully submitted,

WALTER S. HALLANAN,
*Tax Commissioner of the
State of West Virginia.*

E. T. ENGLAND,
*Attorney General of the
State of West Virginia,*

By COUNSEL.

E. T. ENGLAND,
Attorney General of West Virginia.

FRANK LIVELY,
Assistant Attorney General of West Virginia.

JOHN T. SIMMS,
Attorney for State Tax Commissioner's Department.

The foregoing notice bears the following endorsements upon the back thereof:

"Legal service of the within notice is accepted this 2nd day of October, 1920.

UNITED FUEL GAS CO.,
Appellee,

By R. G. ALTIZER,
Atty. in Fact."

"Filed Oct. 5, 1920.

WM. B. MATHEWS,
Clerk Supreme Court of Appeals."

123 At another day, to-wit, on the 8th day of November, 1920, the following order was made and entered:

Absent: Judge Williams.

4201.

UNITED FUEL COMPANY, Plaintiff Below, Appellee.

vs.

WALTER S. HALLANAN, State Tax Commissioner, et al., Defendants
Below, Appellants.

Upon an Appeal from a Decree of the Circuit Court of Kanawha County, Pronounced on the 14th Day of September, 1920.

This day came the appellants, by E. T. England, Attorney General, Frank Lively, Assistant to the Attorney General, John T. Simms, S. B. Avis, Wm. Gordon Mathews and Fred O. Blue, their attorneys, and pursuant to leave of the Court previously obtained and notice duly executed, moved the Court to reverse the decree aforesaid, and thereupon came the appellee, by R. G. Altizer and Malcolm Jackson, its attorneys, and resisted said motion, and this cause was partially heard upon the motion to reverse the decree aforesaid and the arguments of counsel thereon, and is continued until tomorrow morning for further hearing.

At another day, to-wit, on the 9th day of November, 1920, the following order was made and entered:

4201.

UNITED FUEL GAS COMPANY, Plaintiff Below, Appellee.

vs.

WALTER S. HALLANAN, State Tax Commissioner, et al., Defendants
Below, Appellants.

Upon an Appeal from a Decree of the Circuit Court of Kanawha County Pronounced on the 14th day of September, 1920.

This day again came the parties, by counsel, and this cause was fully heard upon the motion to reverse the decree aforesaid and the arguments of counsel thereon, and is submitted for decision.

124 At another day, to-wit, on the 26th day of November, 1920, the following order was made and entered:

4201.

UNITED FUEL GAS COMPANY, Plaintiff Below, Appellee,

vs.

WALTER S. HALLANAN, State Tax Commissioner, etc., et al., Defendants Below, Appellants.

Upon an Appeal from a Decree of the Circuit Court of Kanawha County Pronounced on the 14th Day of September, 1920.

The Court, having maturely considered the motion to reverse the decree aforesaid, the record thereof and the arguments of counsel thereon, is of opinion to, and for reasons stated in writing and filed with the record, and hereby doth, sustain said motion as to part of said decree and overrule said motion as to the remainder thereof. It is therefore adjudged, ordered and decreed that the decree of the Circuit Court of Kanawha County, pronounced in this cause on the 14th day of September, 1920, in so far, as in so far only, as it decrees and holds the Transportation Act, mentioned and described in the bill and proceedings in this cause, being Chapter 5 (House Bill No. 3) of the Acts of the Legislature of the State of West Virginia, extraordinary session held in 1919, to be void and perpetually inhibits, enjoins and restrains the appellants from enforcing or attempting to enforce against the appellee, in any manner or respect, the provisions of said act in so far as the same apply to intrastate commerce as defined by the written opinion filed herein, be and the same hereby is set aside, reversed and annulled, and that in all other respects said decree be and the same hereby is affirmed, and that the appellee do pay to the appellants their costs about the prosecution of their appeal in this Court in this behalf expended: all of which is ordered to be certified to the Circuit Court of Kanawha County.

The decision of points in the foregoing cause, as the same appears from the syllabus and written opinion prepared by Judge Ritz, was concurred in by Judges Poffenbarger and Miller.

The syllabus and written opinion filed in the foregoing cause is in the words and figures following:

125

Supreme Court of Appeals of West Virginia.

No. 4196.

EUREKA PIPE LINE COMPANY

v.

WALTER S. HALLANAN et al.

No. 4201.

UNITED FUEL GAS COMPANY

v.

WALTER S. HALLANAN et al.

Kanawha County.

Affirmed in Part; Reversed in Part.

RITZ, Judge:

1. There is a presumption that the Legislature in the passage of an act did not intend to violate the Constitution of this State, or of the United States, and if such an act is susceptible of two constructions, one of which would make the same invalid as in violation of the Constitution of this State, or of the United States, and the other give validity to the act, the latter interpretation will be adopted upon the theory of legislative intent not to violate any provision of either of said instruments.
2. There is a presumption that the Legislature in the passage of an act intended that it should be effective, and if such an act is susceptible of two constructions, one of which would render the act invalid as being in violation of the Constitution of this State, or of the United States, and the other sustain the validity of the act, the latter will be adopted upon the presumption that the Legislature intended that construction to be given to the act that would make it effective.
3. A State may not impose a tax upon the privilege of engaging in interstate commerce within its borders.
4. A State may not impose a tax upon the privilege of engaging in intrastate commerce, and measure the amount thereof by a certain percentage of all of the business transacted within the State, whether interstate or intrastate.
5. Chapter 5 of the Acts of the Legislature, Extraordinary Session, 1919, imposing a tax upon the business of engaging in the transportation of oil and gas by pipe lines, properly construed, imposes such tax only on those engaged in the transportation

of such commodities in intrastate commerce, measured by the amount of such commerce.

6. The classification, for the purpose of taxation, of pipe line companies engaged in the business of transporting oil and gas into those whose systems are under ten miles in length, and
127 those whose systems are over ten miles in length, is founded upon a substantial distinction, and is not violative of that clause of the Fourteenth Amendment to the Constitution of the United States guaranteeing to all persons the equal protection of the laws, nor of Section 1 of Article 10 of the Constitution of this State, the tax imposed applying alike to all in the same class.
7. Chapter 5 of the Acts of the Extraordinary Session of the Legislature, 1919, imposing a tax upon the privilege of engaging in the business of transporting oil or gas by pipe lines is not invalid because it does not specify at what pressure the gas shall be measured for the purpose of the imposition of such tax. Any difficulty in administering the law on this account may be overcome by a regulation which the State Tax Commissioner is authorized by the provisions of the act to make.
8. Chapter 5 of the Acts of the Legislature, Extraordinary Session, 1919, imposing a tax upon the privilege of engaging in the business of transporting oil or gas by pipe lines over ten miles in length, properly construed does not violate any provision of the Constitution of the United States or the Constitution of this State, and is a valid and binding legislative act.
9. Commodities in transit cannot be said to be interstate commerce until it is definitely determined that they are destined to
128 points without the State, even though past experience and the course of business in which the owner of such commodity is engaged may justify the assumption that a large part thereof will ultimately be transported beyond the borders of the State.
10. Oil being transported through this State to a point beyond its borders does not cease to be interstate commerce because it may as an incident of its transportation through the pipe line come in contact with other oil, and to some extent thereby be contaminated. Such contamination is merely an incident of the transportation, and does not change the character of the oil as interstate commerce.
11. A pipe line company doing business in this State which receives the oil produced at numerous wells and transports the same to its main pipe lines or tanks within the State, and makes a definite charge for such service, is engaged in intrastate commerce, as to the oil so transported, where it appears that at the time such oil was so received and transported to its main lines or tanks by it it was not definitely determined that the same was destined to points without the State, even though past experience may indicate and justify the belief that a

large part of the same will ultimately be shipped without the State in interstate commerce.

Ritz, Judge:

These appeals bring up for review decrees of the Circuit Court of Kanawha County entered in the above entitled causes holding invalid an act of the Legislature providing for a tax on the
129 transportation of oil and gas by means of pipe lines, and enjoining the defendants from collecting the tax levied by said act.

The act in question is Chapter 5 of the Acts of the Extraordinary Session of the Legislature of 1919, the pertinent provisions thereof being:

"An Act to levy a privilege tax on any person, firm or corporation engaged in the transportation of crude oil or petroleum, or distillates thereof, or of natural gas, by means of pipe lines, authorizing the state tax commissioner to provide rules and regulations for the collection of such tax, and defining the duties of the state tax commissioner hereunder.

Be it enacted by the Legislature of West Virginia:

Section 1. No person, firm or corporation, hereinafter called company, after the first day of July, one thousand nine hundred and nineteen, shall engage in or continue in the business of the transportation of crude oil or petroleum, or the distillates thereof, or of natural gas, by means of pipe lines, without the payment of an annual privilege tax hereby imposed for engaging in such business; provided, however, that nothing contained in this act shall apply to any person, firm or corporation engaged in the business aforesaid where the crude oil, petroleum or distillates thereof, or natural gas, is by the entire system of such person, firm or corporation, transported a distance of less than ten miles.

Section 2. Every person, firm and corporation engaged in this state in the transportation of either crude oil or petroleum, or the products and distillates thereof, or of natural gas, or both, by
130 means of pipe lines for sale to consumers within or without the state, or use within or without the state in the making of any products derived therefrom, shall pay to the state, as an annual privilege tax for engaging in such business in the state, two cents for each barrel of crude oil or petroleum, or the distillates thereof, and one-third of one cent for each thousand cubic feet of such natural gas as is so transported or conveyed within this state. Provided, that only one such tax, annually, shall be required to be so paid.

Section 9. Any company engaging or continuing in the business aforesaid, without having first secured a license, as hereinbefore provided, shall be liable to a fine of not less than one thousand dollars nor more than ten thousand dollars."

The contention of the complainants is that this act is in violation of the commerce clause of the Constitution of the United States, for

the reason that the tax therein provided to be collected is a burden upon such commerce. Further, that it violates the provision of the Fourteenth Amendment to the United States Constitution guaranteeing the equal protection of the laws, as well as Section 1 of Article 10 of the Constitution of this State, providing among other things that the Legislature may levy a tax on privileges and franchises by equal and uniform laws. And the gas company also claims that it is invalid upon the additional ground that it does not prescribe a certain measure for the tax, inasmuch as it transports gas under varying pressures, the bulk of which varies because of the differing pressures under which it is transported, and this

131 act not prescribing any particular pressure at which the gas should be measured, there is no certain measure for the tax, wherefore it is void for uncertainty.

The complainant, Eureka Pipe Line Company, is engaged in the business of transporting oil by means of pipe lines. It does not engage in the business of buying and selling or producing this substance, but simply transports it from one point to another for its patrons, upon tariffs prescribing regular charges for such service. It has a pipe line extending from a point on Tug River in Wayne County, through the State, to a point on the Pennsylvania State line. At its southern terminus on Tug River it connects with the Cumberland Pipe Line Company's system, and at its northern terminus on the Pennsylvania State line it connects with the pipe line systems of the Southern Pipe Line Company and the Southwestern Pipe Line Company. It also has a connection at Eureka on the Ohio River with the Buckeye Pipe Line Company, this connection being made by a branch extending from Braden, a point on the line between Tug River and Morgantown, to the Ohio River at Eureka. In addition to these trunk lines the Eureka Company owns many miles of branch or gathering lines extending from the main pipe lines to the fields where the oil is produced, and through which gathering lines it is collected and conducted from the producing wells to the trunk lines, through which it is shipped to market. In addition to handling large quantities of oil produced in West Virginia in this way, it receives at the Tug River terminus

132 a large quantity of oil from the Cumberland Pipe Line Company, which is transported across the State of West Virginia and delivered to the Southern Pipe Line Company at the Pennsylvania State Line for delivery through that company and its connecting carriers to the consignees at the seaboard. This oil is practically all produced in the State of Kentucky, there being a small quantity produced in the County of Cabell in the State of West Virginia. This production in Cabell County is, however, gathered by another company, and all of it thus received by the Eureka Company is delivered to it by the Cumberland Company at the Tug River terminus. This oil is known as Somerset-Cabell oil, and is different in grade and quality from the oil produced in West Virginia. The Eureka Company also receives at its Eureka connection with the Buckeye Pipe Line Company considerable quantities of oil for transportation from that point and delivery to the

Southern Pipe Line Company at the Pennsylvania State line for transshipment to the seaboard. The oil received by it at Eureka is made up of two different grades, one known as Corning Oil, which is produced in the State of Ohio, and the other a small quantity of Pennsylvania grade oil. The Pennsylvania grade oil is the same in quality and grade as the oil produced in West Virginia. The Corning oil, however, is of a lower grade. The complainant pipe line company also receives from the Southwest Pipe Line Company at the Pennsylvania State line large quantities of what is known as mid-continent oil for transportation from that point through its lines to another point on the Pennsylvania State line, for delivery to the Southern Pipe Line Company, for transshipment to
133 the seaboard. This oil is also of a different quality and grade from that produced in West Virginia, and is produced in the State of Texas, Oklahoma and other mid-continent territory. Of the oil produced in West Virginia and transported by the complainant pipe line company, a considerable quantity is delivered to refineries at Parkersburg and St. Mary's. The remainder is ultimately delivered by the complainant pipe line company through its lines to the Southern Pipe Line Company at the Pennsylvania State line for transshipment to the refineries at the seaboard. Without going further into the details of the complainant Eureka Pipe Line Company's business at this time, it is apparent that it is engaged in intrastate commerce to a considerable extent, at least to the extent of the oil delivered by it to the refineries at Parkersburg and St. Marys, and it may be said that it is likewise engaged to a very considerable extent in interstate commerce, as to the volume of which, however, counsel for the respective parties do not agree.

The complainant, United Fuel Gas Company, is engaged, not only in the business of transporting natural gas within the State by means of pipe lines, but also of producing such gas and buying it from other producers and selling it to its customers. Its production and purchase of gas is very substantial. A large quantity of gas thus produced and purchased is by it conveyed to numerous cities and town in the southern part of the State of West Virginia, and sold to the inhabitants thereof. Still another portion is
134 conveyed to the States of Kentucky and Ohio and sold by the complainant to its customers in those States. Another larger portion of it is conveyed to a point on the Ohio River near Ravenswood, where it is sold and delivered to the Ohio Fuel Supply Company, by which company it is conveyed into the State of Ohio and there sold and delivered to the customers of that company. Another considerable quantity of gas is by it delivered from one of its lines at Ball's Gap in Cabell County, West Virginia, to the Columbia Gas and Electric Company, which is by that company sold partly within the State of West Virginia, and partly conveyed by it without the State and sold to its customers in Ohio and Kentucky. It also delivers to the Hope Natural Gas Company and to the Pittsburg and West Virginia Gas Company, at a point in Gilmer County, large quantities of gas, that sold and delivered to the Hope Natural Gas Company being resold by it within the State

to the extent of thirty-three per cent. thereof, and the residue, sixty-seven per cent. without the State; and of that delivered to the Pittsburgh and West Virginia Gas Company, twelve per cent. thereof is sold within the State, and the residue thereof without the State. It will thus be seen that this company is likewise engaged to a very considerable extent in both intrastate and interstate commerce; in fact, counsel concede this to be true, although they do not agree as to the extent of each class of such commerce.

The contention of the complainants is that the act under which it is proposed to collect the taxes sought to be enjoined in this case is an attempt upon the part of the State of West Virginia 135 to charge a tax for the privilege of engaging in interstate commerce, while the defendants contend that the act properly construed does not lay any tax upon the privilege of engaging in interstate commerce, but is only intended to, and, upon a proper construction, does only impose such tax upon the transportation of oil and gas in intrastate commerce within the confines of the State of West Virginia, but contend that the amount of this tax is measured by the total amount of commerce carried on by the complainants of both classes within or through said State. The complainants insist that even though the act be construed as imposing a tax for the privilege of doing intrastate commerce, the amount thereof to be measured by all of its business, both in intrastate and interstate commerce, it is invalid, inasmuch as it would impose a burden upon the interstate commerce carried on by it, as well as upon the intrastate commerce.

If the contention of the complainants that this act is an attempt to impose a tax upon the privilege of carrying on interstate commerce within the State of West Virginia is correct, then undoubtedly it is invalid as being in violation of the commerce clause of the Constitution of the United States. If the act is to be construed as forbidding the complainants from engaging in their interstate business, unless they procure the license therein provided for, it can not be sustained, and this construction, the complainants insist, is the only one consistent with the terms of the act. That a State cannot 136 levy any tax upon interstate commerce, or charge any license for the privilege of engaging in such commerce within the State, is the uniform doctrine of this Court, as well as the Supreme Court of the United States. *Pennywitt v. Blue*, 73 W. Va., 718; *Crutcher v. Kentucky*, 141 U. S., 47; *Robbins v. Shelby County Taxing District*, 120 U. S., 489. The doctrine of these cases has been repeatedly asserted by the Supreme Court of the United States, and, indeed, is not questioned by counsel for the defendants here.

The question, therefore, which confronts us at the threshold is, what is the proper construction of this act in this regard? It will be observed that the act is couched in general terms broad enough to include the business of transporting natural gas and petroleum oil in any class of commerce anywhere. In fact, to give to the language used the most extended application of which it is capable, it would include the transportation of these substances, not only in interstate and intrastate commerce within the State of West Virginia, but in

both of such classes of commerce in any other State in the Union. Of course, the Legislature did not use this language in this broad, comprehensive sense. There are some rules of construction which must be kept in mind in determining the legislative intent. The presumption is that the Legislature did not intend to violate either the Constitution of this State, or of the United States, and where language of a general nature is used which may be construed to embrace within its terms matters beyond the competence of the legislative authority, and also be given a narrower construction consistent with its terms which would confine it within the legislative

137 power, the latter construction will be adopted in order that the legislative purpose may be accomplished, the presumption being, as before stated, that the Legislature intended to use it in such narrow or limited sense rather than in the broad, comprehensive sense which would make it include subjects beyond its power. Another rule which may be said to be a qualification of the one just stated is that there is a presumption that the legislative authority intended the act to have effect, and where it is susceptible of two meanings, one of which would make the act invalid, and the other valid, the latter will be adopted as the one intended by the Legislature. These rules of construction are a part of the fundamental law of the land, and have been applied by the Courts with practical unanimity. In fact, it may be said that they are practical rules of construction applicable to all classes of instruments, whether legislative acts, private contracts, wills or deeds, but their application to the construction of legislative acts is more pronounced, perhaps, than to matters of private contract, largely because of the fact that those engaged in making the laws are more or less familiar with the constitutional limitations upon their powers, and are presumed to have acted with full knowledge of such limitations, and to have intended not to go beyond them. In the case of *Underwood Typewriter Co. v. Piggott*, 60 W. Va., 532, this Court applied the above rules of construction and saved the legislative act in that case from invalidity by restricting it in its application to matters within the legislative competence, although the language was broad enough to extend beyond this limit. We excerpt the following from the

138 opinion of Judge Poffenbarger in that case, at page 536, which aptly expresses the views we have upon this question: "In seeking the true interpretation of the statute in question, rules of statutory construction must be observed, one of which is that a statute will never be so construed as to make it conflict with any Constitutional provision, if the terms used by the Legislature are susceptible of a meaning, and reconcilable to a view, that are consistent with the organic law. That a certain construction or interpretation of a statute will make its operation and effect violative of a constitutional right, or put it under the ban of a constitutional inhibition, is an admonition to the Court that the construction is wrong, if the statute is susceptible of a construction that will make it valid. *Slack v. Jacob*, 8 W. Va., 612; *State v. Workman*, 35 W. Va., 267; *Bridge v. Kanawha Co.*, 41 W. Va., 658 *Robey v. Sheppard*, 42 W. Va., 286. This rule is founded upon two presumptions. One is that the Legis-

lature intended the statute to be operative and effective. This implies the other, that the Legislature knows the limitations upon its power, imposed by the organic law." The same rules of construction were again applied by this Court in the case of *Coal & Coke Ry. Co. v. Conley, et al.*, 67 W. Va., 129, and the language used in the act was limited in its application so as to bring it within the constitutional limitation imposed upon the lawmaking body. Again in the case of *Pennywitt v. Blue*, 73 W. Va., 718, we had under consideration an act imposing a license upon merchandise brokers. It made no distinction between those brokers engaged in interstate commerce and those engaged in intrastate commerce, but imposed a license tax upon those engaged in the business in general terms. In that case we held that the presumption above referred to would limit the act in its application to those brokers engaged in intrastate commerce, holding that the general terms used in the act would be so far restrained as to avoid conflict between it and the Federal Constitution, upon the presumption against intention to violate that instrument. This doctrine has been recognized by the United States Supreme Court in many cases, of which the following are but a few: *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350; *Pullman Co. v. Adams*, 189 U. S., 420; *United States v. Delaware & Hudson Co.*, 213 U. S., 366; *Singer Sewing Machine Co. v. Brickell*, 233 U. S., 304.

The complainants, however, contend that the language of the act in question cannot be so limited. They insist that the language used expresses a clear intent to lay this tax on all of the business done by pipe line companies in the transportation of oil and gas of whatever character, and this contention is based upon the language used in the second section of the act imposing a tax upon such products transported by pipe lines for sale to consumers within or without the State, or for use within or without the State. Without the aid of the attendant facts, this language would seem to indicate a purpose upon the part of the Legislature to impose the tax upon all those transporting oil or gas within the State, regardless of its character, as interstate or intrastate commerce, but when we consider these terms and apply them to the conditions which are shown to exist, the sense in which the Legislature used them may appear to be entirely consistent with an intention upon its part to apply the tax only to the intrastate business of the complainants. As an illustration, it is shown that a large part of the business of the complainant pipe line company consists of the transportation of oil from various wells within the State of West Virginia to the refineries located within the State, at which points it is converted into a product ready for use, and then transported without the State in interstate commerce. Again, it appears that a large part of the business of the pipe line company is the transportation of oil from the producing wells in the State to central points, where it is delivered into its trunk pipe lines and shipped to points, some of which are within, and some of which are without the State. For this gathering process the pipe line company charges a regular and separate charge, and the business is carried on generally before the oil is destined to any particular point, but while it is simply being gathered up and collected in such

quantities as that the owners thereof may find a ready market for it and then after it is so sold it is transported by the pipe line company through its trunk lines to the point of destination, in most instances without the State of West Virginia. A very similar condition affects a large part of the business of the gas company, as will be hereafter seen.

We must presume that the Legislature was familiar with these conditions, and if the language used in the act can reasonably
141 be made to apply to them we will so apply it rather than to give it a construction which would render the act nugatory. This legislation was under consideration for a number of years before it was finally enacted, and the proposition that the State cannot impose a tax upon the business of engaging in interstate commerce is of such universal cognizance that we will not assume that the Legislature intended to violate this constitutional limitation where any other reasonable interpretation can be given to the language, and particularly is this true where the subject matter of the act had been under consideration for a considerable length of time. We, therefore, conclude that this tax, when the act is properly construed, is only upon the privilege of engaging in transporting oil or gas in intrastate commerce within the confines of the State of West Virginia, and that it does not extend to the privilege of engaging in interstate commerce within or without the State. The complainants, if they desire to do so, under our view of this act, might carry on their interstate business, regardless of it, and so long as they did not engage in intrastate business, the penalties prescribed by the act would not apply to them.

Counsel for the respondents, while acceding to the views above expressed, so far as defining the subject of taxation, insist that in ascertaining the amount of the tax they are entitled to take as a basis therefor all of the business done by the complainants, whether in interstate or intrastate commerce. Of course, it may be that particular language will be given different meanings or interpretations
142 when used under different circumstances, or for the accomplishment of different purposes, but it is difficult for us to see why we should attribute to the language of this act a different meaning when applying it to the subject of the tax and the measure of the tax. The language to be construed is the same, and the Legislature was treating of the same general subject, and it cannot well be assumed that they meant the language to mean one thing when defining the subject to be taxed, and the same language to mean an entirely different thing when defining the measure of the tax. Aside from this it may well be doubted whether the Legislature has the power to adopt such a measure for the tax in this case. It will be noted that this tax is in addition to other taxation. It appears that the complainants have paid the taxes assessed against their property within the State; they have likewise paid a tax upon their corporate franchises levied by the State; and also an excise tax upon the profits arising from their business; and it is sought to collect this tax for the privilege of engaging in this particular kind of business in addition to the above taxes. If it can be said that the Legislature has the power to tax the privilege of engaging in a particular kind of intrastate commerce in the State, and then measure that tax by the

amount of interstate commerce done, as well as by the amount of intrastate commerce, it would accomplish by indirection what, by the uniform holdings, it could not accomplish directly. It could under the guise of taxing the privilege of doing intrastate commerce take a part of the interstate commerce. It seems to us that 143 the reasoning which seeks to justify the adoption of the measure of the tax sought to be applied in this case is sophistical, and amounts to simply a confusion of terms, the result being exactly the same as if the tax had been laid upon the privilege of engaging in interstate commerce. The Courts do not look at the form which may be adopted to accomplish a particular purpose, but where it appears that the necessary effect of the procedure contended for is to produce a result which necessarily imposes a burden beyond the power of the Legislature, the form will be disregarded. We do not think the authorities relied upon by the respondents, that the total commerce carried on by the complainants may be used as the measure of the tax, sustain their view. They rely with a great deal of confidence upon the case of *Maine v. Grand Trunk Ry. Co.*, 142 U. S., 217. And it may be said that that case appears to be authority for their proposition. It is, however, in apparent conflict with the case of *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S., 326. In the latter case the Court held that a tax imposed by the State of Pennsylvania upon the gross receipts of a steamship company, when such receipts were derived from commerce between the States and foreign countries, was unconstitutional and void. In the former it was held that a tax imposed by the State of Maine upon a railway company for the privilege of doing business within the State, measured by its total receipts from business done within and 144 without the State in proportion to its total mileage in the State, as compared with the total mileage of the company, was valid. In the case of *Galveston, &c., Ry. Co. v. Texas*, 210 U. S., 217, the Court had under consideration a statute of the State of Texas imposing a tax upon the gross receipts of railroads, including receipts from intrastate as well as interstate business, and held the same invalid. In that case the doctrine laid down in the case of *Philadelphia & Southern Steamship Co. v. Pennsylvania*, above cited, was followed and that case distinguished from the *Grand Trunk Ry.* case. The distinction marked by the Court between the two cases is that in the case of *Maine v. Grand Trunk Ry. Co.*, while the tax imposed was laid upon interstate as well as intrastate commerce, it was imposed in lieu of a property tax. The Legislature undoubtedly had a right to impose a tax upon the property of the company located within the State, and the imposition of this tax by taking a part of its gross receipts would be sustained, unless it appeared that the same was grossly unfair or imposed an unjust and unreasonable burden upon the railroad company. Upon the same theory the tax upon a part of the gross receipts of an express company was justified in the case of *United States Express Co. v. Minnesota*, 223 U. S., 335. Recognizing these distinctions made by the Court in those cases, they lose their force as pertinent authorities in this case for the very good reason that the tax sought to be imposed here is

not one in lieu of a property tax, or is not a method adopted by the Legislature for valuing the property for the purpose of taxation.

This case is much like the case of *Oklahoma v. Wells, Fargo & Co.*, 223 U. S., 298. In that case it was sought to impose a tax on the gross revenue of the express company, not as a means of valuing its property for the purpose of property taxation, but in addition to all other taxes, as is the case here, and the Court held that under those circumstances the tax could not be sustained. The doctrine of this case was followed in the case of *Looney v. Crane Company*, 245 U. S., 178, which involved the right of the State of Texas to impose a privilege tax based upon the amount of commerce carried on, both intrastate and interstate; and also in the case of *Crew Levick Co. v. Pennsylvania*, 245 U. S., 292, in which latter case the case of *Ficklen v. Shelby County Taxing District*, 145 U. S., 1, which is much relied upon by the respondents, is commented upon and distinguished and made inapplicable to the case we have presented here. Reference to the cases we have cited will show that the Supreme Court of the United States has distinguished all of the cases relied upon by the respondents from such a case as is presented by this record, and justify the conclusion in those cases upon grounds which do not here exist. We are constrained to hold that if the interpretation placed upon this act by the respondents is the proper one it would be invalid, or would be no more than a direct tax levied upon the right to do business in interstate commerce. As before stated, however, we do not agree with this interpretation, and the fact that such an interpretation would render the act invalid is a very strong reason for giving it another interpretation if it can reasonably be done. Our conclusion is that the act, both as to the subject of the tax, and as to the measure of it, the language used for both purposes being the same, applies only to intrastate commerce carried on by the complainants.

The complainants insist that the act complained of is invalid for the reason that it denies to them the equal protection of the law guaranteed by the provisions of the Fourteenth Amendment to the Federal Constitution, because it does not require the privilege tax from those engaged in the business of transporting oil and gas through pipe lines under ten miles in length, or from those engaged in transporting it by means other than pipe lines, such as in tank cars by rail. The question presented by this contention is whether or not the classification made by the Legislature for the purpose of the imposition of this tax is a justifiable one. It is uniformly held that notwithstanding, by the Constitution of a State, taxes must be levied by equal and uniform laws, and that the equal protection of the laws is guaranteed by the Fourteenth Amendment of the Federal Constitution, a State in the exercise of its taxing power may classify the subjects of taxation within its limits, and so long as the classifications thus made have a reasonable basis for their existence, and the tax imposed upon each member of each class is uniform, the same does not violate such constitutional limitations. *Pacific Express Co. v. Seibert*, 142 U. S., 339; *King v. Mullings*, 171 U. S., 404; *Citizens' Telephone Co. v. Fuller*, 229 U.

S., 322; *Standard Oil Company v. Fredericksburg*, 105 Va., 147 82; *Sperry & Hutchinson v. Melton*, 69 W. Va., 124. And as declared by the Supreme Court of the United States in *Citizens' Telephone Co. v. Fuller*, supra, the power to classify for the purpose of taxation is broader than such power of classification when exercised for other legislative purposes. It appears in this case that the exemption of pipe lines under ten miles in length is based upon the consideration that such lines are used largely by comparatively small producers, and are owned by them, and are for the purpose of gathering the oil together and conveying it to a branch of a regular pipe line company, and that such short lines are not used to any considerable extent in the regular business of transporting oil. It would seem that this would offer a reasonable basis for the classification thus made. In *Railway Co. v. Conley*, 67 W. Va., 129, an exemption of railroads under fifty miles in length, and of electric lines and street railways from the application of the two-cent rate law was sustained, and this conclusion was approved by the Supreme Court of the United States in *Chesapeake & Ohio Ry. Co. v. Conley*, 230 U. S., 513. The ground for the classification of railroads into those over fifty miles in length, and those under fifty miles in length, it occurs to us has a less substantial basis than the classification made of pipe line carriers in this case. In the case of *King v. Mullins*, supra, the classification of lands into tracts containing less than one thousand acres, and those containing more than one thousand acres was sustained as a proper classification, and in *Pacific Express Company v. Seibert*, supra, a division for 148 the purpose of taxation of those engaged in the express business into those owning their own cars and equipment, and those renting their cars and equipment from railroads, was sustained as a legitimate one; and in *Citizens' Telephone Company v. Fuller*, supra, a classification of telephone lines for the purpose of taxation, making a distinction between the small lines of inconsiderable mileage, and the larger lines used in the general business, was sustained. These decisions and others which are cited in the opinions above referred to, we think, clearly sustain the power of the Legislature to make the classification which it did make in this case, both as between those carriers engaged in the transportation of oil by pipe line and by rail or some other means, and those engaged in transporting it through lines over ten miles in length, and those engaged in the transportation through lines of less than ten miles in length. The contention made by the pipe line company that the act is confiscatory of its property is without merit. As we have construed the act, it does not appear that it will place any unreasonable burden upon the business in which this company is engaged, and if it should be ascertained that such is the case relief would no doubt be granted to it by proper application to the Public Service Commission for authority to increase its rates. The concern of the Courts ordinarily is only as to the power of the Legislature to impose the tax. The extent to which it may go is ordinarily a question for the Legislature to determine, and so long

149 as the tax imposed does not exceed the value of the privilege granted the Courts will not ordinarily interfere to enjoin it upon the ground that it is unreasonable or confiscatory.

The gas company further insists that the act is invalid upon the ground of uncertainty, it not providing that the measurement of the gas shall be made at a particular pressure, and that inasmuch as it transports gas under varying pressures the amount would be increased or decreased as the pressure under which the same was transported was increased or decreased. The act confers upon the State Tax Commissioner authority to make such regulations as may be necessary for its proper administration, and it may be said that if this suggested question presents any difficulty in that regard, it could be, or would be covered by a regulation of the State Tax Commissioner. We think, however, it is a sufficient answer to the objection that this gas, so far as it is purchased, is purchased by measurement, and is sold measured by the thousand cubic feet, and we have never heard, nor are we informed in the record, that the complainant gas company has ever had any difficulty in collecting from its customers because of uncertainty in the amount of gas delivered. If this basis of measurement can be applied by the company in a practical way in carrying on its business between it and its customers, it is a little difficult to understand why it is not certain enough as a measure for the collection of the tax imposed.

It follows from what we have said that the act properly construed is a valid exercise of the legislative power imposing a tax upon the privilege of carrying on the business of intrastate commerce in the transportation of oil and gas, based upon the amount of such commerce.

150 This would dispose of the case were it not for the fact that there is a great diversity of opinion between counsel for the respective parties as to the character of a large part of the commerce handled by the complainants, counsel for the complainants contending that practically all of their business is intrastate, while counsel for the respondents earnestly contend that practically the whole thereof is intrastate commerce, and subject to the tax in any event. This makes it necessary for us to consider, upon the facts presented, the extent to which the injunction granted by the Court below will have to be modified, and makes necessary that we determine what part of the business done by each of the complainants is interstate, and what part intrastate, so that the injunction may be perpetuated as to that part which is not subject to the tax, and dissolved as to the residue.

The oil transported by the complainant pipe line company is classified into four grades, known as Somerset-Cabell, Mid-Continent, Corning, and Pennsylvania. All of the oil produced in West Virginia and transported by this complainant is of the Pennsylvania grade, except a small amount produced in Cabell county, which is delivered to the complainant pipe line company, together with the Somerset oil produced in Kentucky, by the Cumberland Pipe Line Company at the Tug River terminus of the complainant's line. This

oil is transported through the State from this terminus to the terminus of the company at the Pennsylvania State line, and it is insisted that the same constitutes interstate commerce. Counsel for the respondents contend, however, that it cannot be considered as interstate commerce, for the reason that when it is delivered into the State of West Virginia its destination is not yet determined and fixed, and that the oil is not really consigned to a point beyond the State of West Virginia until after or about the time it reaches Morgantown in the pipe line, and sometimes not until it is stored in the tanks at Morgantown; and further that it cannot be considered as interstate commerce, for the reason that while it is in the State of West Virginia it becomes mixed with other oil within the State, which mixture has the effect to change its character from interstate to intrastate commerce, if indeed it can be said to have had a character as interstate commerce. The first proposition is based upon the facts shown that when this oil produced in Kentucky is delivered to the Cumberland Pipe Line Company that company, because of lack of facilities, delivers it, or at least a substantial part of it, to the complainant pipe line company in advance of any consignments therefor, and the complainant pipe line company takes it into its pipe lines and tanks and holds it until such consignments are made, it being claimed that it is thus held in storage in the State of West Virginia for and on behalf of the Cumberland Pipe Line Company, and a charge made therefor. We do not see how this can affect the matter one way or the other. The tax is not laid upon the business of storing oil within the State, but upon the business of transporting it, and assuming that this oil is received in storage by the Cumberland Pipe Line Company, and because of its lack of facilities turned over to the Eureka Pipe Line Company and held by it in storage, its transportation from the point of storage in Kentucky to the point of storage in West Virginia would be as much interstate commerce as if it had changed ownership in the meantime. The transportation is from the point of storage in the State of Kentucky to the point of storage in the State of West Virginia, wherever these respective points may be. The fact that the commodity transported may not have changed ownership during the movement, or that the movement was not for the purpose of effectuating a change of ownership, has nothing to do with fixing its character as interstate commerce. Then when the oil was finally consigned from the point of storage in West Virginia to its destination, which was at the seaboard, this movement was likewise interstate commerce. The complainant argues that the storage was only incidental to the transportation, and this may be true, but whether true or not we do not consider it at all material, for certain it is that whatever movement was made of this oil it was made in interstate commerce. If we treat it as a continuous movement from the point at which it was received by the Cumberland Pipe Line Company in Kentucky to its destination at the seaboard, it was interstate commerce. If we treat it as a broken movement from the State of Kentucky to a point in West Virginia, where the Eureka Pipe Line Company stored it and kept it for awhile, and then reshipped it to its destination, both of these movements were in interstate commerce.

The second ground upon which it is urged that this Somerset oil became intrastate commerce is that it became mixed with other oil in the State, and thus lost its character as interstate commerce. This argument is based upon the showing that the oil is moved through the pipe lines in columns, that is to say, when a sufficient quantity of oil is found on hand to justify it, the grade of oil which is then being transported in the pipe line is turned off and another grade turned in until the supply of this grade on hand is exhausted, when it is turned off, and another grade turned into the line following it. At each end of the column of oil thus formed it comes in contact with oil of another grade, and in this way, to some extent, becomes contaminated or polluted, and it is insisted that because of this its character as interstate commerce is in some way changed, and it becomes a part of the body of the property of the State. It seems to us that this argument is rather strained. This method of transporting oil by pipe lines is one in general use, and it is shown that it is not practicable, indeed not possible, to so transport it without to some extent contaminating the columns of oil of the different grades at the points of contact. This does not in any way, however, change the character of commerce to which it belongs. When the owner of the oil delivers it to the pipe line company he knows from the usage of the business that this will happen, and he agrees that he will accept the oil at the point of destination contaminated to the extent that the exigencies of the transportation may require. This contamination or pollution is simply incident to the movement or transportation of the oil. It is a result that comes therefrom. The property is never received within the State for any other purpose but its transportation therethrough, and if
153 as an incident of that transportation it should necessarily become contaminated with some other substance it cannot be said that its character would be changed. As an incident of transportation of cattle in interstate commerce, they must be fed at different points along the route, and it may be expected that their weight would be increased, or their substance changed from the food thus administered to them, but would it be contended for a moment that this would change their character as interstate commerce, and cause them to become a part of the body of the property of each State in which they were fed? The contamination of this oil by contact is just such an incident of transportation, and has no more effect upon the character of the oil as commerce than feeding the cattle has upon their character as to the class of commerce to which they belong. We are, therefore, of opinion that this Somerset oil transported through the State is not subject to the tax imposed by the act. There is likewise a considerable amount of what is known as Mid-Continent oil delivered to the Eureka Pipe Line Company by the Southwestern Pipe Line Company, transported for a short distance through the State, and again delivered to the Southern Pipe Line Company. This transportation of this oil by the Eureka Company is simply a little link in its journey from the place of production in Texas, Oklahoma, and other mid-continent States, to its ultimate destination at the seaboard. Considerable quantities of Corning oil are likewise received by the Eureka Company from the Buckeye Pipe Line Com-

pany, and transported across the State, and delivered to the
154 Southern Pipe Line Company at the Pennsylvania line. The same is true of considerable quantities of Pennsylvania oil produced in Ohio and delivered by the Buckeye Pipe Line Company to the Eureka Company, and by it delivered to the Southern Pipe Line Company for further transportation to its ultimate destination. The oil thus transported, it is contended by the respondents became intrastate commerce, and subject to the tax, upon the theory of contamination above referred to. What we have said above upon this question sufficiently answers the contention, and indicates the conclusion that this is all interstate commerce, and not subject to the tax.

Of the oil produced in West Virginia and transported by the Eureka Company, a considerable portion thereof is delivered to the refineries located within the State. This, it is admitted, is intrastate commerce. There is still another larger portion, amounting to several million barrels a year, which ultimately finds its way outside of the State. The respondents contend that this is intrastate commerce, while the complainants contend that it is interstate commerce. The contention of the respondents is based upon the showing that this oil is produced in various parts of the State of West Virginia, is delivered to the numerous branch lines of the Eureka Company, and gathered together by it at central points, from which it is ultimately shipped to its destination, some of it within and some of it without the State. At the time the oil is delivered into the pipe lines, the Eureka Company gives to the owner a credit certificate showing that it holds for him a certain number of barrels of oil,

and the oil is then transported through the small feeding
155 lines into which it is delivered until it ultimately reaches the trunk lines. Of course, movement of oil through the trunk lines is continuous, and the agreement of the owner of the oil upon delivery is not that he shall receive back the same oil that he has delivered, but the same amount of oil of a similar grade. We think this agreement with the owner, as well as the statute of this State, which recognizes the right of pipe line companies to deliver a like amount of oil of the same grade in lieu of that received, is the equivalent in law of the delivery of the very oil received. The parties by their contract make it so, and the exigencies of the business, as well as the law of the land, justify the contract. A large part of these credit certificates are bought up by the larger dealers in oil, notably the South Penn Oil Company, and the Carter Oil Company, in which instance the oil is delivered by the Eureka Company through its pipe line at such point as the owner of the credit certificates may direct. For the service rendered by it in gathering the oil together, and conveying it to its trunk lines during the period involved in this case it charged and received twenty cents per barrel, known as a gathering charge, and fixed by the Public Service Commission of West Virginia. This charge has since been increased to thirty cents a barrel. For the transportation of the oil through its main pipe lines, after so gathering it, to the point of destination, it charged a rate fixed by the Interstate Commerce Commission, depend-

ing upon the point of destination, and this rate was divided between it and the connecting carrier upon an approved basis. The pipe line company contends that this oil, so far as it ultimately went without the State of West Virginia was interstate commerce from the very minute that it was delivered to it, while the respondents contend that it did not become interstate commerce until it was definitely determined that its destination was without the State. It cannot be denied that when the oil is delivered to the pipe line company it has no fixed destination. It is known that beyond all reasonable probability a large part of it ultimately will go outside of the State, and a considerable part of it be used within the State at local refineries, but as to what particular producer will sell his oil to the local refineries, and as to which particular producer will ship his oil without the State, is not determined until after the oil is gathered, and the gathering charge above referred to has accrued to the pipe line company. Under this state of facts, we think the process of gathering the oil, for which the charge of twenty cents was formerly made, and for which thirty cents is now charged, is engaging in the business of intrastate commerce. The situation here is very similar to that in *Arkadelphia Co. v. St. Louis S. W. Ry. Co.*, 249 U. S., 134. There it was insisted that rough lumber taken from the woods to milling points in the State, where it remained for several months in the process of manufacture, and was then shipped to points beyond the State was interstate commerce, while being shipped to the mills in its rough state, because it was known in advance that it would ultimately enter into such commerce. The contention was denied upon the ground that while experience and market conditions justified the belief that it would ultimately go into interstate commerce, it did not in fact become such commerce until its destination to a point without the State was identified. Another case very much in point, and throwing much light upon the question involved here, is that of *McCluskey v. Ry. Co.*, 243 U. S., 36. We conclude that the business carried on by the defendant pipe line company in gathering the oil produced in West Virginia and transporting it to the central points for the purpose of shipment, is intrastate business, and subject to the tax referred to, and to the extent that the respondents are enjoined from levying a tax upon such business, the decree rendered by the lower Court will be reversed.

Coming to a consideration of the business of the complainant gas company, we find that a large amount of the gas transported by it is sold and delivered to its customers within the State of West Virginia, which is admittedly intrastate commerce. We also find that a considerable part thereof is transported by it directly through its own lines to the States of Ohio and Kentucky, and there by it delivered to its customers, which is unquestionably interstate commerce, and not subject to the tax. The remainder of the gas transported by it is delivered, a considerable part thereof to the Columbia Gas & Electric Company at a point in Cabell County in this State; another considerable portion delivered to the Ohio Fuel Supply Company at Ravenswood, and the remainder delivered to the Hope

Natural Gas Company and the Pittsburgh and West Virginia Gas Company at a point in Braxton County. We will first consider that portion delivered to the Ohio Fuel Supply Company. It appears that the complainant entered into a contract several years ago with the Ohio Fuel Supply Company to deliver to it a certain quantity of gas per month, or per year, over a certain period of years, and that pursuant to that contract it has been delivering to that company at a point on the Ohio River the quantity of gas called for, which is transported across the river, and all sold by the Ohio Fuel Supply Company to its patrons in the State of Ohio. The apparent difficulty in determining the class to which this commerce belongs results, we believe, from the fact that the transportation companies in each instance is also the owner of the subject of commerce. If we consider the subject of this commerce as owned by parties different from the transportation companies, the question is easy of solution. Suppose that A. B., the owner of the gas in West Virginia, sell to C. D., the consumer of the gas in the State of Ohio, the quantity of gas provided in this case, and that this gas intended and destined for delivery to C. D. is delivered by A. B. to the United Fuel Gas Company as a transportation company for delivery to C. D. through the connecting carrier, the Ohio Fuel Supply Company. It will thus be seen that the United Fuel Gas Company and the Ohio Fuel Supply Company in their capacity as carriers form a single connecting link between the point of production of the gas to the point to which it is destined for consumption. They are in no different position than connecting carriers by rail. The fact that the delivery is made from the one to the other at the State line does not affect the character of the commerce. When it was delivered to the first carrier it was intended and was destined to a point in another State, and that fact gave to it its character as interstate commerce. Whatever may be said as to the duty or obligation of the United Fuel Gas Company as a public service corporation, or of the power of the Public Service Commission to require service from it to its patrons in West Virginia, it cannot be denied that to the extent that it delivers gas to the Ohio Fuel Supply Company for consumption in Ohio, and which is destined to Ohio points at the time it is received by it, it is engaged in interstate commerce, and in such case is not subject to the tax imposed by this act. The gas delivered by it to the other three companies above referred to is on quite a different basis. For the year under consideration, of the gas delivered to one of them, 33 per cent. was sold within the State, and 67 per cent. sold without; of that delivered to another, 12 per cent. was sold within the State, and 88 per cent. sold without; and of that delivered to the other, 99 per cent. was sold without the State, and only 1 per cent. within the State. If we can visualize this situation from the standpoint of the owner of the commodity being different from the company transporting it, we believe the question will be simplified. This gas was all purchased by the several companies and delivered under several contracts which extended over a period of years. At the time it was put in course of transportation it had no fixed destina-

tion other than the point of delivery to the purchasing company, that is to say, it was not known by the owner of the gas
160 where it would ultimately go, as in the case of the gas delivered to the Ohio Fuel Supply Company. It is true it appears that a large part of it was ultimately conveyed without the State and it was known at the time it was purchased that a large part would be so sold without the State, but as to what part neither party to the contract at the time knew; and while the percentages given above apply to the gas delivered for the year under consideration, there is no assurance that the same percentages will apply to any succeeding year, except the probability that the business of these companies will likely be carried on in substantially the same manner. When the owner of the gas, considering the owner as separate from the transportation company, delivered it to the transportation company, no particular part of it, nor any particular percentage of the total, was destined to any point without the State, so that it cannot be said, under the decisions we have above cited in discussing a similar question in its application to the pipe line company, that any part of this gas was interstate commerce during the time it was being transported by the United Fuel Gas Company.

What we have said results in a reversal of the decrees of the Circuit Court to the extent that the defendants are enjoined from collecting the tax upon the intrastate business of the complainants as the same is above defined, and in all other respects said decrees will be affirmed.

161 STATE OF WEST VIRGINIA:

The foregoing is a true and correct copy of the opinion of the Supreme Court of Appeals in the case of Eureka Pipe Line Co. v. Hallanan, St. Tax Com'r from Kanawha County, No. 4196, decided on the 26th day of Nov., 1920.

This certificate is issued before the period for filing petitions for a rehearing in this case has expired, and said copy is not to operate as a mandate in any event.

Given under my hand this 26th day of November, 1920.

WM. B. MATHEWS,
Clerk Supreme Court of Appeals.

162 At another day, to wit, on the 30th day of November, 1920, the following order was made and entered:

Absent: Judges Williams and Lynch.

It is ordered that the operation of the final judgments or decrees entered at this term in appeal cases, not heretofore suspended, since the 30th day of October, 1920, be and the same hereby are suspended for a period of thirty days from the dates said judgments or decrees were entered, and that in each of the causes in which final judgments and decrees were entered in which a petition for rehearing is filed in the office of the Clerk of this Court within said thirty days, the operation of the final judgment or decree in such cause is suspended until the further order of this Court, but in all cases in which a

petition for rehearing is not so filed within said thirty days, the judgments or decrees of this Court shall become final and be severally certified as heretofore directed.

And it is further ordered that the Clerk may certify the mandate to the lower court in any case decided at this term since the 30th day of October, 1920, when the parties jointly request in writing that the mandate may be certified.

163 At another day, to-wit, on the 12th day of January, 1920, the following order was made and entered:

* * * * *

4201.

UNITED FUEL GAS COMPANY

vs.

WALTER S. HALLANAN et al.

From Kanawha County.

* * * * *

The Court, having maturely considered the several petitions for re-argument and rehearing filed in the four foregoing causes, is of opinion to and hereby doth refuse the prayer of said petitions, and doth order that the final judgments or decrees heretofore entered in said causes at a former term of this Court be made absolute and be severally certified as heretofore directed.

The petition for re-argument and rehearing filed in said cause in the office of the Clerk of said Court on the 23rd day of December, 1920, is in the words and figures following:

164 Filed Dec 23, 1920. Wm. B. Mathews, Clerk of the Supreme Court of Appeals.

Supreme Court of Appeals of West Virginia, Charleston.

No. 4201.

UNITED FUEL GAS COMPANY, Plaintiff Below, Appellee,

vs.

WALTER S. HALLANAN, State Tax Commissioner, et al., Defendants
Below, Appellants.

*Petition for Rehearing by United Fuel Gas Company and Argument
in Support Thereof.*

To the Honorable the Judges of the Supreme Court of Appeals of West Virginia:

Your petitioner, United Fuel Gas Company, a corporation, respectfully represents that it is aggrieved by the decision and decree

of this Honorable Court, in the above entitled cause, of the 26th day of November, 1920, in so far as the same reversed in part
165 the decree of the Circuit Court herein, and respectfully prays that said decree, to that extent, may be set aside and said cause be reheard, and that leave be given to this petitioner to have the same reargued, for the following reasons:

First: It is respectfully submitted that the construction given by the court to the Act of the Legislature in question, in order to bring it within the constitutional limitations upon the Legislature, is in direct conflict with the legislative intent in enacting said statute, because the effect of such construction is to levy a discriminatory tax against the natural gas consumed in this State in favor of that exported into other States, whereas, the public discussion and agitation which preceded and induced said enactment was founded upon the argument that thereby the State would obtain a revenue from such exported gas, which constituted by far the major portion of all the gas produced within the State, as averred in the fifteenth paragraph of the bill of complaint. That the Legislature did not intend to encourage the transportation of natural gas outside the State by means of a discriminatory tax upon its consumption within the State, is apparent, we submit, from the clear and express language of the statute under consideration, which language, taken in connection with the circumstances and conditions then existing, reveals an intention directly the opposite of that resulting from the decision herein.

Second. If, however, this Honorable Court shall, upon further consideration, adhere to its construction of said statute as embodied in its opinion of November 26, 1920, counsel for this petitioner are impelled to urge upon the Court the necessity of
166 some further consideration of certain matters arising upon the pleadings, some of which are referred to in the opinion of the Court, and others of which are not referred to in the opinion nor discussed in the briefs. Their omission from our brief results from the fact that counsel for the appellants did not contend, either in the Circuit Court or in this Court, for any such construction of the statute as that which is given by the opinion herein, and the relevancy of the matters referred to was not discernable until after the construction which has been given to said statute by this Court. The matters referred to are the following:

(a) That the transportation of gas sold by petitioner to the Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company is a transaction in interstate commerce, notwithstanding such gas is delivered by petitioner to said purchasing companies at points in the State of West Virginia, as is shown by certain conceded facts which will be hereinafter referred to.

(b) That the transportation of said gas last above mentioned, for delivery to said three companies, is not a transportation thereof "for sale to consumers within or without the State, or use within or with-

out the State in the making of any products derived therefrom." By reference to Section two of the statute in question, it will be observed that the privilege for which the license is required is
167 the transportation of natural gas, by means of pipe lines, for either one of two purposes, and for no other purposes, namely: (1) for sale to consumers within or without the State; or (2) use within or without the State in the making of any products derived therefrom; and that, by a proviso of the same section, only one such tax annually shall be required to be paid. It will be contended by petitioner upon rehearing, if allowed, that the purpose of the proviso in Section two of said Act, taken in connection with the other parts of said section, was to limit the exaction of said tax of one-third of one per cent per thousand cubic feet where the same gas was transported by more than one pipe line company before reaching the consumer, and that such tax should apply only to the particular company or agency which transported the gas for sale directly to the consumer. The seventh paragraph of the bill of complaint (pages 24 and 25 of the printed record) sets forth the contrary construction given to this section by the defendant Tax Commissioner, but it is not discussed in the briefs filed nor referred to in the opinion of the Court. Its importance is very great, inasmuch as a very large part of the gas produced in the State is transported by more than one company before it reaches the consumer, and in many instances by more than two companies, and in some instances by as many as five, each of which operates as much as ten miles of pipe line.

168 (c) It is alleged in the bill of complaint, and admitted by the answer, that the defendant Tax Commissioner has promulgated a regulation which he is attempting to enforce with respect to the exemption contained in Section one of the Act, by which regulation any person engaged in the business of transporting natural gas who operates as much as ten miles of pipe line shall be taxed for the privilege, at the rate prescribed, upon all gas transported, notwithstanding a part thereof may be transported less than ten miles, while it is contended by your petitioner that the transportation of gas for a distance of less than ten miles is wholly exempted, regardless of the length of line which may be operated by a given taxpayer. No reference to this issue is made in the opinion of the Court.

(d) It clearly appears from the record that the same pipe lines are used for transportation of gas for consumption at points within the State as those employed for its transportation without.

In the seventh paragraph of the stipulation it is agreed that the plaintiff is a public utility corporation under the laws of West Virginia, by reason of its charter and the character of the business in which it is engaged, and that it is subject to the laws of said State as such corporation also in the third paragraph that the Columbia Gas and Electric Company, Hope Natural Gas Company and Pittsburgh and West Virginia Gas Company are all public service utility corporations under the laws of West Virginia. It is also stipulated

in the first paragraph, subdivision (c) that "In each of the incorporated cities or towns in West Virginia wherein the plaintiff
 169 sells its gas, it does so under franchises granted it by such cities or towns, except in the incorporated town of South Charleston."

If by reason of these facts, or for any other reason, this petitioner is not free to discontinue its intrastate business of transporting gas for consumption at points within the State and thereafter continue to conduct solely the interstate commerce in which it is conceded by the opinion to be engaged, then the tax in question is required to be paid as a condition precedent of your petitioner remaining to engage in interstate commerce and therefore invalid under authorities cited in our brief but not referred to in the Court's opinion.

Argument.

The first ground assigned as the basis of this application was fully discussed in the briefs formerly filed in this case and in the case of the Eureka Pipe Line Company submitted at the same time, and while none of the contentions then made are intended to be waived, yet it is not our purpose at this time to reargue any question upon which the Court has reached a deliberate conclusion. Nevertheless, the Court is respectfully urged to consider again whether or not the Legislature intended to impose a tax on the consumption of natural gas in this State while permitting it, at the same time, to be transported for use in other States free of such burden. We submit that the clear intent of the Legislature, from the language which it used and from the known circumstances and conditions
 inducing its action, was not only to burden, but, as far as possible, to prevent the transportation of natural gas in interstate commerce, and that it is the duty of this Court, upon the
 170 Discovery of such intent, to adjudge it contrary to the Constitution of the United States.

Whatever may be said as to the intention of the Legislature in the enactment of the statute in question, this court, in its opinion, holds that it was beyond the power of the Legislature to impose any tax upon the privilege of engaging in interstate commerce, but finds that the major portion of the business of this petitioner, namely, that of transporting and selling gas to the Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, is not interstate commerce. In reaching this conclusion the Court does not refer to all the facts appearing in the record with respect to the manner in which this business originated and is conducted. We ask leave, therefore, to specify certain allegations of the bill of complaint which are not denied and certain other facts which are stipulated to be true.

The Court knows judicially that for a number of years preceding the enactment of said statute the State of West Virginia produced more natural gas than any other State in the United States, and that there was no market within the State for as much as one-half of the production; that large transportation lines were constructed from

various localities of the State to adjoining States, and an enormous business inaugurated in the transportation of such gas for use in Pennsylvania, Ohio, Kentucky and Maryland. The lines constructed by this petitioner are described in the bill of complaint, and in the fifth paragraph of said bill (page 20 of the printed record) the following allegation is made, and not denied, relating to the character of the business of the petitioner with respect to the gas sold by it to said three companies. Following a statement of the entire quantity of gas produced and purchased by petitioner, it is alleged that approximately 42,000,000 M cubic feet of gas was,

"During the year ending July 1, 1919, transported across the boundary line of the State of West Virginia into the States of Kentucky, Ohio and Pennsylvania, in some instances entirely through pipe lines owned and operated by your orator, and in other instances by means of connecting pipe lines of companies to whom your orator sells such natural gas, and in each instance where the gas is sold by your orator to Ohio Fuel Supply Company, Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, it is by said purchasing companies transported into States adjoining the State of West Virginia, by means of connecting and continuous pipe lines, without interruption of its flow, the same being measured while in transit without stopping or coming to rest for any purpose until it reaches the ultimate consumers and users thereof in the States of Kentucky, Ohio and Pennsylvania. The said gas so transported and sold by your orator to each of the four companies above mentioned, is so transported and sold under contracts with said companies, which in each case contemplated that the principal part of the gas sold was to be transported into States other than that in which it was produced, for sale and use in such other States, and each of said companies, in the contract which it made with your orator for the purchase of said gas, bound itself to construct, and afterwards did construct, to the terminus of one or another of the main trunk lines hereinbefore mentioned as owned and operated by your orator, a connecting pipe line for the purpose of transporting by continuous pipe line to localities outside of the State of West Virginia, for sale and use in said localities outside the State of West Virginia, the natural gas so sold by your orator to said purchasing companies respectively, except a comparatively small portion of such gas which it was contemplated would be sold and has been sold by each of said purchasing companies along their lines in West Virginia."

And in paragraph nine (page 27 of the printed record) the following:

"That the gas sold by your orator to the Ohio Fuel Supply Company, Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, as above referred to, is, in each instance, so supplied by virtue of a contract with such purchasing company, at a fixed price per thousand cubic

feet for all of the natural gas so sold to each of said companies; that all of said contracts were in existence long before the passage of said pretended statute levying said privilege tax upon the transportation of natural gas by pipe line in the State of West Virginia, and each of them covers a period of a number of years yet to come; that in and by each of said contracts with the four companies above mentioned, it was contemplated and intended by the parties thereto, and

173 your orator bound itself, to transport, by means of pipe lines in the State of West Virginia, large quantities of natural gas for transportation by each of said purchasing companies to localities in other States there to be used and consumed, by means of continuous pipe lines from points where such natural gas was produced, and the said gas heretofore delivered and sold by your orator to said four several companies, and which is now being so delivered and sold, has been, is and will be transported mainly for sale and use at places outside the State of West Virginia and in other States of the United States in commerce between such other States and the State of West Virginia. In the year ending July 1, 1919, your orator transported and delivered, for such interstate purposes, to the Ohio Fuel Supply Company 10,283,019 M cubic feet, to the Columbia Gas & Electric Company 7,567,353 M cubic feet, to the Hope Natural Gas Company 7,961,333 cubic feet, and to Pittsburgh & West Virginia Gas Company 7,270,429 M cubic feet of natural gas."

These facts are in no way controverted, but by stipulation it is agreed that certain percentages of the gas so delivered to said Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company is by them resold in the State of West Virginia, but that in each case by far the larger percentage is transported outside, in accordance with the original intent. In the case of the Columbia Gas & Electric Company it is stipulated that at least 99% of the gas so delivered to it is transported outside the State. We call attention to the fact that it is not even stipulated, with reference to this company, that as much as 1% of such gas is used

174 within the State, but merely that at least 99% is exported and not more than 1% consumed within. If the Court will refer to the map exhibited with the bill of complaint, it will be observed that the pipe line of the Columbia Gas & Electric Company leading from the delivery point at Ball's Gap to the State line south of Kenova, passes through no city, town or village of this State, but, on the contrary, through a sparsely settled country, and, as a matter of fact, every part of the gas so delivered by this petitioner to said Columbia Gas & Electric Company at Ball's Gap is by the latter company transported outside the State, except that supplied incidentally to a few farmers for use in their dwelling houses along the route of said pipe line.

In the case of the deliveries to the Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, the percentages of the gas consumed within this State are larger, but surely it cannot be denied that the bulk of this business is of an interstate character, and that the local or intrastate business is a mere incident to the principal transaction. In the sixth paragraph of the stipulation

(page 93 of the printed record), the statement is made that it is contemplated that the business of the plaintiff, in respect to these and other matters, would remain in the future of the same general character as during the period to which the bill of complaint particularly related. In the face of these admitted facts, we ask this Court to consider again whether it is correct to say, as stated in the Court's opinion, with reference to the gas delivered to said three companies, that "at the time it was put in the course of transportation it had no fixed destination, other than the point of delivery to the purchasing company, that is to say, it was not known by the owner of the gas where it would ultimately go, as in the case of the gas delivered to the Ohio Fuel Supply Company. It is true it appears that a large part would be so sold without the State, but as to what part neither party to the contract at the time knew; and while the percentages given above apply to the gas delivered for the year under consideration, there is no assurance that the same percentages will apply to any succeeding year, except the probability that the business of these companies will likely be carried on in substantially the same manner." Is it fair to say, for example, that when the Columbia Gas & Electric Company contracted with petitioner for the gas which is being delivered to it, and constructed its pipe line from the City of Cincinnati, Ohio, to the measuring station at Ball's Gap, for the sole and only purpose of supplying said City of Cincinnati with gas, to which purpose substantially all of the gas delivered by petitioner to said Company is and has always been devoted, that it was not known by the owner of the gas where it would ultimately go, or that its destination in the future is problematical? Upon further consideration, we insist the Court must reach the conclusion that the character of this business, in all material respects, is identical with that of the deliveries by petitioner to Ohio Fuel Supply Company.

In this connection, we desire to furnish the Court with copies of an opinion of the Court of Appeals of New York in a case decided October 19, 1920, not yet officially reported, involving a somewhat similar question with reference to a statute of the State of New York, levying a tax upon the privilege of carrying on business in that State as a corporation, and in which the constitutionality of the statute was questioned by two natural gas companies, one of which transported all of the natural gas sold by it in the State of New York from the State of Pennsylvania, and the other of which transported from Pennsylvania 74% of the gas sold by it in New York, the remaining 26% being produced in the latter State. The question before the court was whether a tax could be exacted by the State of New York for the privilege of conducting this business. It was held, as to the company which transported its entire supply from the State of Pennsylvania, that its entire business was interstate commerce and no tax could be exacted for the privilege of conducting the same, while in the case of the company, which imported from Pennsylvania 74% of the gas which it sold in New York, it was held that the tax should be pro rated so as to be levied upon the intra-

state business only, the Court saying, with reference to the divisibility of the tax, that

"No point is made of our power to separate the statute into its valid and invalid elements. Counsel upon the argument at our bar announced the willingness of his client to submit to an assessment proportioned to the local business. We think, in any event, that *Raterman v. Western Union Tel. Co.* (127 U. S. 411), rather than *Oklahoma v. Wells Fargo & Co.* (223 U. S., 298, 302), supplies the applicable rule."

177 But, in answer to the contention on the part of the State, in the case of the company which imported a part of its gas, that the gas from Pennsylvania became commingled with that produced in New York and therefore lost its interstate character, the Court said:

"We think, however, that deliveries through those mains as through the other are exempt from local burden to the extent that the product is imported. As we pointed out in *Matter of Penn. Gas Co. v. Public Service Commission* (225 N. Y., 397, 402): 'The test to be applied will vary with the method of transportation and the subject of the sale.' Here the agency of the carriage is a pipe, and the subject of the sale a gas. A carload of grain transported from one State to another and consigned to a single purchaser will not lose its quality as a subject of interstate commerce if a bushel of grain is added to the shipment after crossing the State line. Gas transported from Pennsylvania, consigned to one distributor in Buffalo, does not become subject, without limit, to the taxing power of the locality because on the way there has been an infusion of an insignificant proportion of gas produced within the State. Receipts from sales of local gas make up about 26 per cent of the relator's business in New York, but only a minor part of this percentage represents sales of the home product transported through the mains that carry gas from Pennsylvania. Most of the home product is consumed by the localities in the neighborhood of its source. We are unable to persuade ourselves that the incident has absorbed the principal; that the stream has lost itself in the tributary, and that the infusion of the local product, while the imported one is still
178 in transit, before the destination has been reached or a state of rest attained, makes severance of the business into its elements impossible, and fixes upon the transit as a whole the stamp of local commerce."

We leave this subject by merely calling attention to the fact that in both the cases of *Public Utilities Commission v. Landon*, 249 U. S., 236, 242 Fed., 658 and *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S., 28, the character of the commerce in natural gas was held to be interstate under circumstances remarkably similar to the transactions now under discussion. In the *Landon* case the natural gas in question was being produced in the States of Kansas and Oklahoma and transported across those States for delivery to distribution companies supplying cities in both Kansas and Missouri.

Of course, no particular part of the gas produced in Kansas was consigned to points outside the State, but the communities along the line were supplied from the common source and the remainder transported to Missouri. In the Pennsylvania Gas Company case the gas was all produced in the State of Pennsylvania, and a pipe line operated from the point of production across the boundary line to certain localities in the State of New York, various communities in Pennsylvania being supplied along the route of the line and the remainder of the common supply transported to cities in the State of New York. In both these cases the Supreme Court concluded that as to such part of the gas as crossed the State boundary line for consumption, the transportation was interstate commerce, notwithstanding the fact that certain quantities were drawn off from the common supply in each case and consumed in the State of its origin.

179 So much for the question of whether or not the gas transported for delivery to these three companies is a transaction in interstate commerce on the part of this petitioner.

We desire now to call the Court's attention, for the first time, to a further question in connection with the construction of the statute as applied to this particular part of the petitioner's business. As already stated, the privilege which the statute purports to tax is that stated in Section two of transporting natural gas by means of pipe lines for sale to consumers within or without the State, or use within or without the State in the making of any products derived therefrom, and the section concludes with a proviso that only one such tax shall be levied. The transportation of gas for purposes other than those specified in the Act is not attempted to be taxed. It must be presumed that the Legislature, before enacting said statute, acquainted itself with the methods in which these businesses were conducted, and made some estimates of the amount of revenue which the measures were intended to produce. If so, they found, as the fact is, that the business of transporting natural gas by pipe line in West Virginia is so conducted that the greater part of all gas produced is transported by more than one pipe line company between the point of production and the point of sale for consumption. There are many varieties in this situation. In some instances the same gas is transported by two separate companies, each a part of the journey; in others by three, and in some by as many as five, all having a separate system of lines more than ten miles in length. 180 The Legislature also had at hand full information as to the entire quantity of gas produced within the State during the years immediately preceding, and the quantity thereof which was consumed both within and without the State. If it were attempting to levy a tax which would produce a given revenue, the same could be determined with approximate correctness when applied uniformly to all the gas produced, while, on the other hand, approximation would be exceedingly difficult, if not impossible, because of the varying situation above mentioned, if the tax were to be assessed against each single act of transportation by the various agencies contributing to the movement of any particular gas from producer to consumer. It was undoubtedly the intention of the Legislature by the proviso in Section two, although imperfectly expressed, to exempt from the tax

the transportation of gas by one company for delivery to another, rather than for sale to a consumer, because by the terms of the statute every foot of the gas so delivered by petitioner to the three companies above referred to would be subject to a tax when transported by said purchasing companies for sale to consumers, whether within or without the State. There is no escape from the conclusion that there was an intention that the gas should be subjected to the tax when transported by the purchasing companies, because they, or some other company to whom they might deliver it would necessarily transport it for sale to consumers, and so bring it within the

181 letter of the Act. There is likewise no escape from the conclusion that, although crudely expressed, there was a legislative intent that no gas should be taxed more than once in the course of its transportation, and that discrimination between separate communities, with respect to the burden of the tax, should not be made to depend upon whether the gas supplied to a given community was so supplied through one pipe line company operating the entire system from the point of production to the point of consumption, or by several different companies, each performing a separate part of such transportation.

There is another circumstance of perhaps even greater importance, which the Legislature is presumed to have taken into consideration and which contributed to the use of the language employed to describe the privilege which it was sought to tax as a privilege for engaging in the business of transporting gas for sale to consumers, as distinguished from its transportation for sale to another company to be transported to consumers by the latter. As is well known, the furnishing of natural gas to consumers in this State is and has been for a number of years a public service. The rate or price at which such sales are made is not the subject of private contract, but is fixed by public authority. A tax of this character is, of course, an operating expense in connection with such public service and would be borne eventually by the persons to whom the service is furnished. The Public Service Commission of West Virginia, in fixing the rates at which gas shall be sold and consumed within the State, would be

182 required to take into consideration such tax and to fix a rate which would enable its payment. Not so, however, where gas is sold by one company to another, such as the deliveries made by petitioner to Columbia Gas & Electric Company, for example. As averred in the bill, the prices received by petitioner from the four companies to which it delivers gas within the State, *is* fixed for a number of years in the future by private contract. It must be assumed that the Legislature, realizing the inequity of imposing such a tax where the contract price had been fixed without any reference to the same, intended that the tax should be paid by that transporter of the gas whose rates for the sale of the same were sufficiently flexible to absorb the tax.

If it be said, however, that the language of the statute is doubtful or ambiguous, then the rule of construction is well settled, for statutes of this character are, under all of the authorities, to be strictly construed. The right of a person to conduct a lawful business cannot be

burdened with a privilege tax without clear and explicit legislative authority. No better statement of the rule can be made than that contained in Sutherland's Statutory Construction (2nd Ed.), Vol. 2, Sec. 537, as follows:

"Laws imposing taxes are strictly construed and doubts are resolved in favor of the taxpayer. But some courts hold that such laws, being for public purposes, should be liberally construed in favor of the public. 'Duties,' says Mr. Justice Nelson, 'are never imposed upon a citizen upon vague or doubtful interpretations.' Statutes which impose restrictions upon trade or common occupations, or which levy an excise tax upon them, must be strictly construed. A statute conferring authority to impose taxes must be construed strictly. A tax law can not be extended by construction to things not named or described as the subject of taxation."

See also the following cases:

American Net, &c., Co. v. Worthington, 141 U. S., 468;
 U. S. v. Isham, 17 Wall., 496;
 East Livermore v. Livermore Trust Co., 103 Maine, 418, 69
 Atl., 306;
 Hart v. Smith, 159 Ind., 182;
 Sewall v. Jones, 9 Pick., 412;
 Boyd v. Hood, 57 Pa. St., 98;
 Fox's Appeal, 112 Pa. St. 337.

The third reason assigned as ground for a rehearing is a determination of the issue presented by the bill as to whether, by the terms of the Act, a person operating more than ten miles of pipe line is taxable upon all of the gas which he may transport for any distance, or only on that part of the gas which is transported as much as ten miles. The statute is ambiguous on this question, and, under the authorities cited above, we insist it should be strictly construed and doubts resolved in favor of the taxpayer, so that gas transported by any person or company a distance of less than ten miles is exempt from the tax, contrary to the ruling of the Tax Commissioner referred to in the bill.

We now come to the last assignment, which relates to a matter upon which the Court expressed no opinion, but which goes to the constitutionality of the entire Act as applied to the business of this petitioner. The opinion of the Court construes the statute in question to be a tax upon the privilege of engaging in intrastate business only, and concedes the right of petitioner, and all other persons, to engage in interstate commerce, free of any such tax. It remains to be determined whether or not, under the construction given by the Court, this petitioner is free to continue its interstate business and to withdraw from its local business so as to avoid the payment of said tax. If the Court intends to say that petitioner is free to continue its interstate business and withdraw entirely from the business of transporting gas to the consumers thereof now being supplied by it in the State of West Virginia, then

such a construction is not complained of. We insist, however, that the State cannot with one hand compel the continuance of a local or intrastate service, while with the other, it compels the payment of a tax for so doing as a condition of continuing in interstate commerce. If petitioner has any right of election as to its continuance in local business then it is entitled to know of that right and to exercise the same before being compelled to pay the privilege tax. The Supreme Court of the United States has spoken emphatically on this subject in the case of Pullman Company v. Adams, 189 U. S., 420, 47 Law Ed., 877, where there was under review a statute of the State of Mississippi levying a tax on the privilege of operating sleeping cars from one point to another within the State. The Pullman Company resisted the collection of the tax upon the ground that all of its 185 cars were carried by the various railroad companies into the State from another State, or out of the State to another State, while during their passage they carried passengers from point to point within the State, and further contended that the tax was a burden on its commerce between the States while, at the same time, it was compelled, under the Constitution of Mississippi, to carry passengers between points within the State as a common carrier. The tax was upheld upon the ground that the Pullman Company was not a common carrier under the laws of Mississippi and was free to withdraw from its intrastate business, the Court, through Mr. Justice Holmes, saying:

"If the clause of the State Constitution referred to (being the clause which it was claimed made the Pullman Company a common carrier) were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the State Constitution and the statute combined would impose a burden on commerce between the states analogous to that which was held bad in Crutcher v. Kentucky, 141 U. S., 47, 35 L. Ed., 649, 11 Sup. Ct. Rep., 851. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the State, the case is governed by Osborne v. Florida, 164 U. S., 650, 41 L. Ed., 586, 17 Sup. Ct. Rep., 214. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax.

186 "As the validity of the tax is thus bound up with the effect of the section of the State Constitution, we think that the Pullman Company was entitled to know how it stood under the latter, and that a judgment against it could not be justified by reasoning which leaves that point obscure. We are somewhat embarrassed in dealing with the case, because we are not quite certain whether we rightly interpret the intimations upon the subject in the judgment under review. If the Constitution of Mississippi should be read as imposing an obligation to take local passengers, the question for us might be which, if not both, the clause of the Constitution or the tax act, is invalid. But we assume that the

opinion of the Supreme Court of Mississippi intends to meet the difficulty frankly, and when it says that the argument against the tax drawn from the above interpretation of the Constitution is fallacious, we take it as meaning that no such interpretation will be attempted in the future, and we take it so the more readily that we can see no ground for a different view."

Similar statutes of the State of Tennessee came before the Court in *Allen v. Pullman Palace Car Co.*, 191 U. S., 171, 48 L. Ed., 134. A statute of that State of 1887 levied a privilege tax on the operation of sleeping cars at a fixed sum for each car per annum, without any specification as to whether the cars might be operated in intrastate or interstate commerce, and this the Court held to be unconstitutional, saying:

"The statute now under consideration requires payment of the sum exacted for the privilege of doing any business, when
187 the principal thing to be done is interstate traffic. We are not at liberty to read into the statute terms not found therein or necessarily implied, with a view to limiting the tax to local business, which the legislature, in the terms of the act, imposed upon the entire business of the company. We are of opinion that taxes exacted under the act of 1887 are void as an attempt by the State to impose a burden upon interstate commerce."

The same opinion dealt with a later statute of 1889, which levied a privilege tax upon sleeping car companies "for one or more passengers taken up at one point in this State and delivered at another point in this State." In discussing this latter statute, the Court said:

"Its terms apply strictly to business done in the transportation of passengers taken up at one point in the State and transported wholly within the State to another point therein."

It was held that this latter statute was constitutional and valid upon the express ground that under the law of Tennessee the Pullman Company was free to discontinue its intrastate business, while at the same time continuing its interstate business, and that, therefore, it might escape the tax by withdrawing from the local business. The Court, after referring to the statute of Tennessee which permitted carriers to decline their services to whomsoever they chose, said:

"Under this act, no carrier is required to admit any passenger to his car or means of transportation. While the Pullman
188 Company may not be technically a common carrier, still we think it comes within the scope and meaning of this act. A sleeping car is obviously a public means of transportation. Under this act, the carrier is not obliged to afford its privileges to those making application therefor. * * * It follows that a tax imposed upon domestic business, under the circumstances shown, cannot be a burden upon interstate commerce in such sense as will invalidate it."

It is respectfully submitted that the failure of the Court to make any finding or adjudication upon the question of whether or not this petitioner is free to withdraw from the intrastate business in which it is engaged is, in itself, sufficient ground for the rehearing applied for. All of the circumstances and conditions surrounding the conduct of petitioner's natural gas business, both intrastate and interstate, are presented by the bill of complaint. We submit that if this Honorable Court shall uphold the validity of the statute in controversy upon the ground that it is a privilege tax upon the petitioner for the conduct of its intrastate business alone, then this Court ought to determine, as stated by the Supreme Court in Pullman Co. v. Adams, *supra*, whether or not the petitioner is free to withdraw from its intrastate business and confine its operations in the transportation of natural gas to its interstate business alone. Unless the petitioner has the right to discontinue engaging in the business for which the privilege tax is assessed, then it follows of course that the payment of the tax is a condition precedent to the right of petitioner to engage in interstate commerce. We
189 are conscious that rehearings should not be asked nor allowed for trivial reasons but it is urged, respectfully, that the grounds assigned herein are exceptional and that a determination of the questions now presented is essential to a complete decision of the issues presented by the pleadings.

Respectfully submitted,

MALCOLM JACKSON,
R. G. ALTIZER,
*Counsel for United Fuel Gas
Company, Petitioner.*

190 At another day, to-wit, on the 1st day of February, 1921, the following order was made and entered:

Absent: Judges Lynch and Lively.

4201.

UNITED FUEL GAS COMPANY, Plaintiff Below, Appellee,

vs.

WALTER S. HALLANAN, State Tax Commissioner, etc., et al., Defendants Below, Appellants.

Upon an Appeal from a Decree of the Circuit Court of Kanawha County, Pronounced on the 14th Day of September, 1920.

This day came United Fuel Gas Company, by its attorneys, and informed the Court that it desired to present a petition to the Supreme Court of the United States for a writ of error or writ of certiorari, or both, to the decree of this Court entered on the 26th day of November, 1920, and made final by the order of this Court entered on the 12th day of January, 1921, and moved the Court for an

order suspending the execution of said decree and to stay the mandate herein for a period of ninety days from the 12th day of January, 1921, which motion is hereby granted; and it is ordered that, upon the said United Fuel Gas Company, or some one on its behalf, executing bond, in the penalty of Ten Thousand Dollars, conditioned according to law, before the Clerk of this Court, with surety to be approved by him, within ten days, execution on said decree be, and the same is hereby, suspended for a period of ninety days from the 12th day of January, 1921, and that the mandate be stayed during such time.

A copy of said bond filed in the office of the Clerk of said Court is in the words and figures following:

191 Know all men by these presents:

That we, United Fuel Gas Company, a corporation, as principal, and United States Fidelity & Guaranty Company, a corporate bonding company authorized to do business in the State of West Virginia, as surety, are held and firmly bound unto the State of West Virginia, in the just and full sum of Ten Thousand Dollars (\$10,000.00), to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly, severally and firmly by these presents. Sealed with our seals and dated this 4th day of February, 1921.

The condition of the above obligation is such that,

Whereas, upon the application of United Fuel Gas Company, a corporation, the Supreme Court of Appeals of the State of West Virginia, on the 4th day of February, 1921, entered an order suspending the execution of the decree entered by said court on the 26th day of November, 1920, and made final and absolute by a further decree entered by said court on the 12th day of January, 1921, whereby the petition for rehearing, filed therein by United Fuel Gas Company, was refused and denied, and staying the mandate thereon for a period of ninety days from the 12th day of January, 1921, in a cause pending in said court, wherein said United Fuel Gas Company was plaintiff below, appellee, and Walter S. Hallanan, State Tax Commissioner, and E. T. England, Attorney General, of the State of West Virginia, were defendants below, appellants, being cause No. 4201 upon the docket of said court, upon an appeal from a decree of the Circuit Court of Kanawha County, pronounced on the 14th day of September, 1920, conditioned upon the execution of a proper bond, in the penalty and sum aforesaid, before the Clerk of said Supreme Court of Appeals of the State of West Virginia; and,

Whereas, said United Fuel Gas Company intends to apply to the Supreme Court of the United States, or a Justice thereof, for a writ of error or writ of certiorari, or both, directed to the Supreme Court of Appeals of the State of West Virginia, to review the said decree entered as aforesaid on the 26th day of November, 1920, and

192 for the purpose of allowing said United Fuel Gas Company time in which to make such application;

Now, therefore, if the said United Fuel Gas Company, a corpo-

ration, shall pay all such damages as any person may sustain by reason of the said suspension, in case a supersedeas to said decree should not be allowed and be effectual, within the time so specified, then this obligation to be void; else to remain in full force.

Witness the corporate name and corporate seal of United Fuel Gas Company, affixed hereto by R. G. Altizer, its Vice President, and the corporate name and corporate seal of said United States Fidelity & Guaranty Company, affixed hereto by B. B. James, its duly authorized Attorney-in-Fact.

[SEAL.] UNITED FUEL GAS COMPANY,

By R. G. ALTIZER,

Vice-President.

UNITED STATES FIDELITY & GUARANTY
COMPANY,

By B. B. JAMES,

Attorney-in-fact.

[SEAL.]

Signed, sealed and acknowledged before me and approved as sufficient this 4th day of February, 1921.

WM. B. MATHEWS,

Clerk Supreme Court of Appeals of W. Va.

A true copy.

Attest:

WM. B. MATHEWS,

Clerk.

193 In the Supreme Court of Appeals of West Virginia, January Term, 1921.

In Equity.

No. 4201.

UNITED FUEL GAS COMPANY, Plaintiff Below, Plaintiff in Error,
vs.

WALTER S. HALLANAN, State Tax Commissioner, and E. T. England, Attorney General of the State of West Virginia, Defendants Below, Defendants in Error.

Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of Appeals of the State of West Virginia.

The Petition of United Fuel Gas Company, a corporation, of West Virginia, respectfully shows:

First. That on the 26th day of August, 1919, your petitioner instituted a suit in chancery against the above named defendants, and thereupon filed against them its bill of complaint praying that the said defendants, in their official capacities as State Tax Commissioner and Attorney General, respectively, of said State of West Virginia,

and all persons acting under their direction and control, be perpetually enjoined from enforcing or attempting to enforce against your petitioner, as complainant in said suit, any of the provisions of a certain statute enacted by the Legislature of the State of West Virginia at the extraordinary session thereof in the year 1919, which was signed and approved by the Governor of said State to become effective on the 1st day of July, 1919, and known as Chapter 5 of the Acts of said session and entitled:

194 "An Act to levy a privilege tax on any person, firm or corporation engaged in the transportation of crude oil or petroleum, or the *the* distillates thereof, or of natural gas, by means of pipe lines, and authorizing the state tax commissioner to provide rules and regulations for the collection of such tax, and defining the duties of the state tax commissioner."

In and by its said bill of complaint so filed, your petitioner alleged that it was incorporated under the laws of the State of West Virginia, by a certificate of incorporation bearing date the 1st day of February, 1916, and became the successor, by purchase and conveyance, of all the works, assets, property and franchises, of every character whatsoever, of a certain other corporation previously organized under the laws of said State of West Virginia; that at all times since it has owned and operated all of the works, assets and property so acquired, and conducted the business previously conducted by its said predecessor; that the business so conducted by your petitioner since the date of its incorporation, continuously, to the time of the institution of said suit, consisted chiefly in the production and purchase of natural gas and the transportation thereof, by means of pipe lines, for sale and consumption as fuel, the details of said business being set forth at length in said bill of complaint, it being shown thereby that large volumes of such natural gas were produced by petitioner from lands owned by it or held under lease, located chiefly in the State of West Virginia, but partly in Kentucky, and other large volumes purchased by petitioner from other producers near the points of production, from lands located chiefly in West Virginia, but in part in Kentucky, and transported, by means of pipe lines owned and operated by petitioner, for sale by petitioner, in some instances to purchasers and users thereof in the State where such natural gas was produced, but mainly for sale and consumption in States other than that
195 in which the same was produced; and showing, also, that a part of the natural gas so produced or acquired by petitioner was by it transported directly through lines owned and operated by it, from the State in which such gas was produced to the ultimate consumers of such gas in other States of the United States, in commerce between such States and the State of West Virginia, and that another part of the natural gas so produced and purchased by your petitioner was by it transported, by means of pipe lines, and delivered to other corporations at connecting points between the pipe lines of such other corporations and those of your petitioner in the same State in which such gas was produced, but was, in such instances, thereafter, without interruption of the flow of said gas, transported by such other

corporations, by means of their connecting pipe lines, for sale and use chiefly outside the State in which such gas was produced. It was also shown that the natural gas so transported by petitioner and delivered by it to such other companies was so sold and delivered in compliance with certain contracts between your petitioner and such other corporations requiring such delivery over a period of years not yet expired. In and by said bill of complaint it was alleged that the Act of the Legislature of the State of West Virginia, passed at its extraordinary session in the year 1919, and known as Chapter 5 of the Acts of said session, the enforcement of which it was sought to enjoin in said suit, purporting to levy a tax upon the privilege of transporting natural gas for sale to consumers thereof, either within or without the State of West Virginia, in so far as it attempted to levy such tax upon the privilege of transporting natural gas by means of pipe lines used in the transportation of natural gas from the State of West Virginia to other States of the United States, or from
196 other States of the United States to and into the State of West Virginia, in commerce between such States, was and is a direct and immediate burden upon the commerce between the States of the United States, in which petitioner was and is engaged; that said statute of the State of West Virginia impairs the obligations of valid contracts to which your petitioner is a party; that the necessary effect of the enforcement of said statute would be to deprive your petitioner of its property without due process of law, contrary to the Fourteenth Amendment and other provisions of the Constitution of the United States; to deny to your petitioner the equal protection of the laws, and to abridge the privileges and immunities of your petitioner, contrary to the Fourteenth Amendment and other provisions of the Constitution of the United States; and that the enforcement of said statute against your petitioner would necessarily regulate, restrict and to a great extent prohibit commerce between the States, of the character conducted by your petitioner, and would exact from your petitioner for the privilege of conducting its business in the transportation of natural gas from one to another of the States of the United States, a tax amounting to more than one hundred thousand dollars annually.

Second. That after the filing of said bill of complaint in said Circuit Court of Kanawha County, West Virginia, a court of general jurisdiction of said State, the defendants therein appeared and filed their joint and separate demurrer and answer to the said bill, denying in said answer that the said statute violated any of the
197 provisions of the Constitution of the United States, and prayed that the bill be dismissed, and thereafter, on the 27th day of January, 1920, with the leave of said court, the parties, plaintiff and defendant, tendered and filed, as a part of the record of said cause, a stipulation theretofore entered into by them as to certain facts in issue upon said bill and answer, and thereupon, on said last mentioned day, said cause was submitted to said Circuit Court, for final decision and decree, upon said bill, answer and stipulation, and the court took time to consider of its judgment thereon, and afterwards, to-wit, on the 14th day of September, 1920, the said Circuit

Court, by its final decree, adjudged said Act of the Legislature of West Virginia, known as Chapter 5 of the Acts of the extraordinary session of 1919, attempting to levy a privilege tax upon the transportation of natural gas, by means of pipe lines, for sale to consumers within or without the State of West Virginia, to be unconstitutional and void as against your petitioner and the business conducted by it as set forth in its bill of complaint, and thereupon granted a perpetual injunction against the defendants, inhibiting and enjoining them from enforcing said Act of the Legislature, or any of the terms thereof, against your petitioner.

Third. On the 1st day of October, 1920, upon the petition of the defendants to said bill of complaint, the Supreme Court of Appeals of West Virginia allowed an appeal from said final decree of the Circuit Court of Kanawha County, West Virginia, entered on the 14th day of September, 1920, which appeal was regularly matured and said cause heard and decided by said Supreme Court of Appeals, and the final decree of said Supreme Court was entered on the 26th day of November, 1920, which reversed in part and affirmed in part said final decree of the Circuit Court of Kanawha County, West Virginia. That in and by said final decree of the Supreme Court of Appeals of West Virginia, upon said appeal, the said statute of the State of West Virginia, purporting to levy said privilege tax, was held to be constitutional and valid, and the contentions of your petitioner in said suit that said statute was a violation of the commerce clause of Article 1, Section 8, of the Constitution of the United States, in violation of the Fourteenth Amendment of the Constitution of the United States, in that it deprived petitioner of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, in that it abridged the privileges and immunities of your petitioner, and in violation of Article 1, Section 10, of the Constitution of the United States, in that it impaired the obligations of contracts to which your petitioner is a party, were all and singular overruled, and said statute of the State of West Virginia was thereby adjudged and decreed not to contravene or violate any of the provisions of the Constitution of the United States, and the said statute was construed by said Supreme Court of Appeals, in its written opinion accompanying and referred to in said decree, as a tax upon the privilege of engaging in transporting oil or gas in intrastate commerce within the confines of the State of West Virginia, and that it does not extend to the privilege of engaging in interstate commerce within or without said State. The effect of said final decree of said Supreme Court of Appeals, as interpreted by its written opinion accompanying the same, is to construe said statute of the State of West Virginia as a valid tax upon your petitioner for the privilege of conducting its business of transporting natural gas, by means of pipe lines, in intrastate commerce, and as not applying to the business conducted by your petitioner in the transportation of natural gas in interstate commerce; but said final decree, as interpreted by said written opinion, erroneously adjudges and decrees that the business conducted by petitioner, as set forth in its bill of complaint, consisting of the trans-

portation of natural gas, by means of pipe lines, from the points of production thereof in the State of West Virginia to other points in said State, for delivery and sale to Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, respectively, for further continuous transportation by said three last named Companies, by means of their connecting pipe lines, are not transactions by your petitioner in interstate commerce, and erroneously adjudged and decreed that said business of your petitioner in the transportation, sale and delivery by it of said natural gas to said three Companies, respectively, for further transportation by them, respectively, to points outside the State of West Virginia, for sale and consumption outside said State, are transactions by your petitioner in intrastate commerce alone, and as such, subject to the tax prescribed by said statute.

That after the rendition of said final decree by said Supreme Court of Appeals of West Virginia, your petitioner, in conformity with the laws of said State, and within thirty days after the entry of said decree, to wit, on the 23rd day of December, 1920, tendered and filed its petition for a rehearing of said cause in said Supreme Court of Appeals, which petition was, by an order of said court made and entered on the 12th day of January, 1921, refused and denied.

200 and said decree is now the final decree of said court, and said Supreme Court of Appeals is the highest court of the State of West Virginia having jurisdiction of said controversy.

Fourth. Your petitioner therefore shows that in and by said suit, instituted as aforesaid, in which said final decree was rendered by said Supreme Court of Appeals of West Virginia, there was drawn in question the validity of a statute of the State of West Virginia, known as Chapter 5 of the Acts of the Legislature of said State, passed at its extraordinary session of 1919, purporting to levy a privilege tax upon the business of transporting natural gas and crude oil, by means of pipe lines, and of an authority exercised under said State, and your petitioner expressly urged in its pleadings and argument against the validity of said statute the contentions that the said statute was a direct and immediate burden upon interstate commerce, in violation of Section 8 of Article 1 of the Constitution of the United States, and that the said statute was in violation of the Fourteenth Amendment and other provisions of the Constitution of the United States, and the decision of said Supreme Court of Appeals of West Virginia in said suit was against said contentions and in favor of the validity of said statute.

Your petitioner was and is aggrieved by the said final decree of the Supreme Court of Appeals of West Virginia, and avers that in the aforesaid decree certain errors were committed to the prejudice of petitioner, all of which will more fully appear from the assignment of errors which is filed herewith.

Wherefore, your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this cause to the Supreme Court of Appeals of West Virginia, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated by

201 the Clerk of the said Supreme Court of Appeals of West Virginia, may be sent to the Supreme Court of the United States, as provided by law, and that such other or further proceedings may be had in the premises as may be just and proper.

UNITED FUEL GAS COMPANY,
Petitioner.

MALCOLM JACKSON,
R. G. ALTIZER,
Attorneys for Petitioner.

Charleston, W. Va.

Writ of error allowed upon the execution of a bond by United Fuel Gas Company, petitioner, in the sum of twenty-five thousand Dollars. Said bond, when approved, to operate as a supersedeas.

Dated March 15th, 1921.

EDWARD D. WHITE,
Chief Justice of the United States.

201a [Endorsed:] United Fuel Gas Company vs. Walter S. Hallanan, State Tax Commissioner, et al. In Equity. Petition for Writ of Error.

202 In the Supreme Court of Appeals of West Virginia, January Term, 1921.

In Equity.

No. 4201.

UNITED FUEL GAS COMPANY, Plaintiff Below, Plaintiff in Error,
vs.

WALTER S. HALLANAN, State Tax Commissioner, and E. T. England, Attorney General of the State of West Virginia, Defendants Below, Defendants in Error.

Assignments of Error.

And now comes the above named plaintiff in error, by its attorneys, whose names are hereunto signed, and in connection with its petition for writ of error herein, says that in the records and proceedings and in the rendering of the decree and decision of the Supreme Court of Appeals of West Virginia, in the above entitled cause, manifest error has intervened, to the prejudice of this petitioner and plaintiff in error, in this, to wit:

First. It was error for said Supreme Court of Appeals of West Virginia to adjudge, order and decree that the statute of the State of West Virginia, the validity of which was challenged in said suit, was not a direct and immediate burden upon the interstate commerce

in which said petitioner was and is engaged, in violation of the commerce clause of Article 1, Section 8, of the Constitution of the United States, and to adjudge, order and decree that said statute was not, for that reason, unconstitutional and void, either in whole or in part.

203 Second. It was error for said Supreme Court of Appeals to adjudge, order and decree that said statute of the State of West Virginia does not operate to deprive petitioner of its property without due process of law, and does not abridge the privileges and immunities of petitioner, and does not deny to petitioner the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States.

Third. It was error for said Supreme Court of Appeals to adjudge, order and decree that said statute does not impair the obligations of contracts to which petitioner is a party, contrary to Section 10 of Article 1 of the Constitution of the United States.

Fourth. It was error for said Supreme Court of Appeals to adjudge, order and decree that the business conducted by petitioner, as set forth in its bill of complaint, in the transportation of natural gas from the points of production thereof in the State of West Virginia to another point in said State, in performance of a contract for the sale and delivery at such latter point of said natural gas to Columbia Gas & Electric Company for further continuous and uninterrupted transportation by said Columbia Gas & Electric Company, by means of its connecting pipe line, to points outside the State of West Virginia, there to be sold and consumed, was and is not a transaction on behalf of petitioner in interstate commerce, and to require petitioner to pay a tax upon the privilege of engaging in such transportation.

Fifth. It was error for said Supreme Court of Appeals to adjudge, order and decree that the business conducted by petitioner, as set forth in its bill of complaint, in the transportation of natural
204 gas from the points of production thereof in the State of West Virginia to another point in said State, in performance of a contract for the sale and delivery at such latter point of said natural gas to Hope Natural Gas Company for further continuous and uninterrupted transportation by said Hope Natural Gas Company, by means of its connecting pipe line, to points outside the State of West Virginia, there to be sold and consumed, was and is not a transaction on behalf of petitioner in interstate commerce, and to require petitioner to pay a tax upon the privilege of engaging in such transportation.

Sixth. It was error for said Supreme Court of Appeals to adjudge, order and decree that the business conducted by petitioner, as set forth in its bill of complaint, in the transportation of natural gas from the points of production thereof in the State of West Virginia to another point in said State, in performance of a contract for the sale and delivery at such latter point of said natural gas to Pittsburgh & West Virginia Gas Company for further continuous and uninterrupted transportation by said Pittsburgh & West Virginia Gas Com-

pany, by means of its connecting pipe line, to points outside the State of West Virginia, there to be sold and consumed, was and is not a transaction on behalf of petitioner in interstate commerce, and to require petitioner to pay a tax upon the privilege of engaging in such transportation.

Seventh. It was error for said Supreme Court of Appeals in making and entering its final order and decree on the 26th day of November, 1920, upon the appeal from the decree of the Circuit Court of Kanawha County, West Virginia, pronounced on the 14th day of September, 1920, to reverse the said decree of the Circuit Court as to part of said decree.

205 Eighth. That the said Supreme Court of Appeals of West Virginia erred in holding and declaring that—

“Commodities in transit cannot be said to be interstate commerce until it is definitely determined that they are destined to points without the State, even though past experience and the course of business in which the owner of such commodity is engaged may justify the assumption that a large part thereof will ultimately be transported beyond the borders of the State.”

Ninth. That the said Supreme Court of Appeals of West Virginia erred in holding and deciding that said Act of the State of West Virginia, being Chapter 5 (House Bill No. 3) of the Acts of the Legislature of that State, passed at its extraordinary session in 1919, properly construed, is a valid exercise of the legislative power imposing a tax upon the privilege of carrying on the business of intrastate commerce in the transportation of oil and gas, based upon the amount of such commerce, and that said Act is, therefore, constitutional and does not violate Section 8 of Article 1 of the Constitution of the United States, and does not violate the Fourteenth Amendment and other provisions of the said Constitution.

Tenth. That the said Supreme Court of Appeals of West Virginia erred in holding and deciding that the tax provided for in a certain statute of West Virginia, being Chapter 5 (House Bill No. 3) of the Acts of the Legislature of the State of West Virginia, extraordinary session held in 1919, when such Act is properly construed, is only a tax upon the privilege of engaging in transporting oil or natural gas in intrastate commerce within the confines of the State of West Virginia, and that it does not extend to the privilege of engaging in interstate commerce within or without the State, and that, therefore, the said Act is valid and is not repugnant to the Constitution of the United States, and particularly to Section 8 of Article I thereof.

206 Eleventh. That said Supreme Court of Appeals of West Virginia erred in holding and deciding that the statute of West Virginia, known as Chapter 5 (House Bill No. 3) of the Acts of the Legislature of West Virginia, Extraordinary Session held in 1919, applies only to intrastate commerce carried on by the plaintiff in error, as such

intrastate commerce is defined in a written opinion filed by said Court in this cause, and therefore is valid and is not repugnant to the Constitution of the United States, and particularly to Section 8 of Article I thereof; because as such intrastate commerce is defined it includes a large portion of the business of plaintiff in error which was wholly interstate; that therefore the effect of said decision was to adjudge that the said Act imposed a valid tax upon the said interstate business of plaintiff in error, and since the amount of such tax or imposition is by the language of the Act made to fluctuate with the volume of the business done, said Act, under said construction, imposes a direct burden upon interstate commerce and thereby violates the Constitution of the United States, and particularly Section 8 of Article I thereof.

MALCOLM JACKSON,
R. G. ALTIZER,
Attorneys for Plaintiff in Error.

206a [Endorsed:] United Fuel Gas Company vs. Walter S. Hallanan, State Tax Commissioner, et al. In Equity. Assignment of Errors.

207 Know all men by these presents, That we, United Fuel Gas Company, a corporation of West Virginia, as principal, and United States Fidelity & Guaranty Company, a Surety Corporation of the State of Maryland, as sureties, are held and firmly bound unto Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the State of West Virginia, in the full and just sum of Twenty-five Thousand dollars, to be paid to the said Walter S. Hallanan, State Tax Commissioner, as aforesaid, and E. T. England, Attorney General, as aforesaid, their and each of their certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this Eleventh day of March, in the year of our Lord one thousand nine hundred and twenty-one.

Whereas, lately at a term of the Supreme Court of Appeals of the State of West Virginia, in a suit depending in said Court, between United Fuel Gas Company, a corporation of West Virginia, and Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the State of West Virginia, a decree was rendered against the said United Fuel Gas Company, and the said United Fuel Gas Company having sued out a writ of error from the Supreme Court of the United States to said Supreme Court of Appeals of West Virginia, having obtained such writ and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Walter S. Hallanan, State Tax Commissioner, as aforesaid, and E. T. England, Attorney General, as aforesaid, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said United Fuel Gas Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

UNITED FUEL GAS COMPANY, [SEAL.]
By R. G. ALTIZER, [SEAL.]
Vice-President.

UNITED STATES FIDELITY &
GUARANTY COMPANY,
By LEE B. MOSHER,
Attorney-in-Fact.

Sealed and delivered in presence of—
T. L. PERKINS.

Approved by—
EDWARD D. WHITE,
Chief Justice of the United States.

208 (25c Internal Revenue Stamp Duly Canceled on Original
hereof.)

Certified Copy.

General Power of Attorney.

24710.

Know all men by these presents:

That the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, and having its principal office at the City of Baltimore, in the State of Maryland, does hereby constitute and appoint Lee B. Mosher, Charles R. Hooff and George B. Robet of the City of Washington, District of Columbia its true and lawful attorneys for the following purposes, to-wit:

To sign its name as surety to, and to execute, seal and acknowledge any and all bonds, and to respectively do and perform any and all acts and thing set forth in the resolution of the Board of Directors of the said United States Fidelity and Guaranty Company, a certified copy of which is hereto annexed and made a part of this Power of Attorney; and the said United States Fidelity and Guaranty Company, through us, its Board of Directors, hereby ratifies and confirms all and whatsoever any one of the said Lee B. Mosher and the said Charles R. Hooff and the said George B. Robet may lawfully do in the premises by virtue of these presents.

In witness whereof, the said United States Fidelity and Guaranty Company has caused this instrument to be sealed with its corporate

seal, duly attested by the signature of its Vice-President and Assistant Secretary this 7th of May, A. D. 1919.

[SEAL.]

UNITED STATES FIDELITY AND
GUARANTY COMPANY.

(Signed)

By W. W. SYMINGTON,

Vice-President,

(Signed)

WM. M. PEGRAM,

Assistant Secretary.

STATE OF MARYLAND,
Baltimore City, ss:

On this 7th day of May, A. D. 1919, before me personally came W. W. Symington, Vice-President of the United States Fidelity and Guaranty Company, and Wm. M. Pegram, Assistant Secretary of said Company, with both of whom I am personally acquainted, who being by me severally duly sworn, said that they resided in the City of Baltimore, Maryland; that they, the said W. W. Symington and Wm. M. Pegram were respectively the Vice-President and Assistant Secretary of the said United States Fidelity and Guaranty Company, the corporation described in and which executed the foregoing Power of Attorney; that they each knew the seal of said corporation; that the seal affixed to said Power of Attorney was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that they signed their names thereto by like order as Vice-President and Assistant Secretary, respectively, of the Company.

My Commission expires the first Monday in May, A. D. 1920.

[SEAL.]

(Signed)

WARREN S. LLOYD,

Notary Public.

STATE OF MARYLAND,
Baltimore City, sc:

I, Stephen C. Little, Clerk of Superior Court of Baltimore City, which Court is a Court of Record, and has a seal, do hereby certify that Warren S. Lloyd, Esquire, before whom the annexed affidavits were made, and who has thereto subscribed his name, was at the time of so doing a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments, or proof of deeds to be recorded therein. I further certify that

209 I am acquainted with the handwriting of the said Notary, and verily believe the signature to be his genuine signature.

In testimony whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City, the same being a Court of Record, this 7th day of May, A. D. 1919.

[SEAL.]

(Signed)

STEPHEN C. LITTLE,

Clerk of the Superior Court of

Baltimore City.

Copy of Resolution.

That whereas, it is necessary for the effectual transaction of business that this Company appoint agents and attorneys with power and authority to act for it and in its name in States other than Maryland, and in the Territories of the United States and in the provinces of the Dominion of Canada and in the Colony of Newfoundland.

Therefore be it resolved, that this company do, and it hereby does, authorize and empower its President or either of its Vice-Presidents in conjunction with its Secretary or one of its Assistant Secretaries, under its corporate seal, to appoint any person or persons as attorney or attorneys-in-fact, or agent or agents of said Company, in its name and as its act, to execute and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performance of contracts other than insurance policies and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings, or by law allowed, and

Also in its name and as its attorney or attorneys-in-fact, or agent or agents to execute and guarantee the conditions of any and all bonds, recognizances, obligations, stipulations, undertakings or anything in the nature of either of the same, which are or may by law, municipal or otherwise, or by any Statute of the United States or of any State or Territory of the United States or of the Province of the Dominion of Canada or of the Colony of Newfoundland, or by the rules, regulations, orders, customs, practice or discretion of any board, body, organization, office or officer, local, municipal or otherwise, be allowed, required or permitted to be executed, made, taken, given, tendered, accepted, filed or recorded for the security or protection of, by or for any person or persons, corporation, body, office, interest, municipality or other association or organization whatsoever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything or any conditions which may be provided for in any such bond, recognizance, obligation, stipulation, or undertaking, or anything in the nature of either of the same.

I, Wm. M. Pegram, Assistant Secretary of the United States Fidelity and Guaranty Company, hereby certify that at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company, at the City of Baltimore, on the 11th day of July, A. D. 1910, at which was present a quorum of said Directors, duly authorized to act in the premises, resolutions were passed and entered on the minutes of Company, of which resolutions the foregoing is a true copy and of the whole thereof.

In testimony whereof, I have hereunto set my hand and the seal of the United States Fidelity and Guaranty Company, this 7th day of May, A. D. 1920.

[SEAL.]

(Signed)

WM. M. PEGRAM,
Assistant Secretary.

I, Wm. M. Pegram, Assistant Secretary of the United States Fidelity and Guaranty Company, do hereby certify that the above and foregoing is a full, true and correct copy of the original power of attorney given by said company to Lee B. Mosher, Charles H. Hooff and George B. Robey, of Washington, D. C., authorizing and empowering them to sign bonds as therein set forth, and do hereby further certify that the said power of attorney is still in full force and effect.

210 Given under my hand and the seal of said Company, at Baltimore, Maryland, this 14th day of April, A. D. 1920.

[SEAL.]

(Signed)

WM. M. PEGRAM,

Assistant Secretary.

A true copy from the original bond which has been filed in my office.

Attest:

WM. B. MATHEWS,

*Clerk Supreme Court of Appeals of
West Virginia.*

211 UNITED STATES OF AMERICA, *as:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the State of West Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Appeals, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between United Fuel Gas Company, plaintiff, and Walter S. Hallanan, State Tax Commissioner, and E. T. England, Attorney General, of the State of West Virginia, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties,

212 or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said plaintiff, United Fuel Gas Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the

record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fifteenth day of March, in the year of our Lord one thousand nine hundred and twenty-one.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

Allowed by

EDWARD D. WHITE,

Chief Justice of the United States.

213 [Endorsed:] Supreme Court of the United States, October Term, 1920. United Fuel Gas Company vs. Walter S. Hallanan, State Tax Commissioner, et al. Writ of Error. Filed Mar. 17, 1921. Wm. B. Mathews, clerk of the Supreme Court of Appeals.

214 UNITED STATES OF AMERICA, *ss:*

To Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the State of West Virginia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Appeals of the State of West Virginia, wherein United Fuel Gas Company, a corporation of West Virginia, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this fifteenth day of March, in the year of our Lord one thousand nine hundred and twenty-one.

EDWARD D. WHITE,

Chief Justice of the United States.

215 Due and legal service of the within writ accepted on behalf of the within named defendants in error, Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the State of West Virginia, and further service waived, this the 17th day of March, 1921.

WM. GORDON MATHEWS,

S. B. AVIS,

F. O. BLUE,

E. T. ENGLAND,

Attorneys of record for

Defendants in Error.

216 STATE OF WEST VIRGINIA:

In obedience to the commands of the within writ, I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of West Virginia, herewith transmit to the Supreme Court of the United States a true and complete transcript of the record in the cause of United Fuel Gas Company against Walter S. Hallanan, State Tax Commissioner, and E. T. England, Attorney General, of the State of West Virginia, as the same appears upon the records of my said office, together with all things concerning the same, which transcript is comprised of pages numbered from 1 to 216.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 17th day of March, 1921, and in the 58th year of the State.

[Seal of Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS,
Clerk Supreme Court of Appeals.

Endorsed on cover: File No. 28,192. West Virginia Supreme Court of Appeals. Term No. 835. United Fuel Gas Company, plaintiff in error, vs. Walter S. Hallanan, State tax commissioner of the State of West Virginia, and E. T. England, attorney general of the State of West Virginia. Filed March 31st, 1921. File No. 28,192.

SEP 17 1921

JAMES D. MAHER,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1920

No. [REDACTED] 276

UNITED FUEL GAS COMPANY,)
 Plaintiff in Error,)
 vs.) Writ of Error
WALTER S. HALLANAN, State Tax) to the Supreme
 Commissioner, and E. T. ENG-) Court of Ap-
 LAND, Attorney General, of the) peals of the
 State of West Virginia,) State of West
 Defendants in Error.) Virginia.

UNITED FUEL GAS COMPANY,) Petition for Writ
 Petitioner,) of *Certiorari* to
 vs.) the Supreme
WALTER S. HALLANAN, State) Court of Appeals
 Tax Commissioner, and E. T.) of the State of
 ENGLAND, Attorney General,) West Virginia.
 of the State of West Virginia,)
 Respondents.)

BRIEF FOR PLAINTIFF IN ERROR AND PETI-
TIONER.



SUBJECT INDEX.

	Page
Statement of case	2
Substance of the transportation tax act.....	6
Nature of business of plaintiff in error in the transportation of natural gas	12
Decision of Supreme Court of Appeals upon questions involved, as applied to the business conducted by plaintiff in error.....	20
Specification of errors	23
Points of argument	25
Argument	29
Appendix	49

TABLE OF CASES CITED.

	Page
Allen v. Pullman Co., 191 U. S. 171.....	28
Arkadelphia Co. v. St. Louis S. W. Ry. Co., 249 U. S. 134	41
Atchison, Topeka & Santa Fe Ry. Co. v. Harold, 241 U. S. 371,	26-39
Bowman v. Oil Co. (U. S.) Adv. Sheets July 15, 1921	28-44
Code of West Virginia, Ch. 125, Sec. 4790.....	20
Judicial Code, Sec. 237	25
McCluskey v. Railway Co., 243 U. S. 36.....	41
Merchants National Bank v. City of Richmond (U. S.) Advance Sheets July 15, 1921	26
Norfolk & Western R. Co. v. Pennsylvania, 136 U. S. 114	26-39

United Fuel Gas Co. vs. Hallanan, Tax Comr.

Ohio R. R. Commission v. Worthington, 225 U. S.	
201 -----	27-40
Pennsylvania Gas Co. v. Public Service Commission,	
252 U. S. 28 -----	26-40
Pennsylvania R. R. Co. v. Clove Bros., 238 U. S. 466	27-40
People <i>ex rel.</i> &c. v. Saxe, 229 N. Y. Reps. 446-----	26-37
Public Utilities Commission v. Landon, 249 U. S.	
236 -----	26-40
Pullman Co. v. Adams, 189 U. S. 420-----	28-43
Railroad Commission of Ind. v. Texas & P. R. Co.,	
229 U. S. 336 -----	26-39
Swift v. U. S., 196 U. S. 398 -----	27-40
The Daniel Ball, 10 Wall 557 -----	26-39
Underwood Typewriter Co. v. Chamberlain, 254 U.	
S. 113 -----	28-43
Wabash, St. Louis & Pac. Ry Co. v. Illinois, 118 U.	
S. 557 -----	26-39
West v. Kansas Natural Gas Co., 221 U. S. 229-----	26
Western Oil Co. v. Lipscomb, 244 U. S. 346-----	27-40
Western Union Tel. Co. v. Foster, 247 U. S. 112---	27-40
Yick Wo v. Hopkins, 118 U. S. 356 -----	28

IN THE
Supreme Court of the United States

OCTOBER TERM, 1920

No. 835.

UNITED FUEL GAS COMPANY,)	
<i>Plaintiff in Error,</i>)	
<i>vs.</i>	)	Writ of Error
WALTER S. HALLANAN, State Tax	)	to the Supreme
Commissioner, and E. T. ENG-	)	Court of Ap-
LAND, Attorney General, of the	)	peals of the
State of West Virginia,	)	State of West
<i>Defendants in Error.</i>	)	Virginia.

UNITED FUEL GAS COMPANY,	)	Petition for Writ
<i>Petitioner,</i>	)	of <i>Certiorari</i> to
<i>vs.</i>	)	the Supreme
WALTER S. HALLANAN, State	)	Court of Appeals
Tax Commissioner, and E. T.	)	of the State of
ENGLAND, Attorney General,	)	West Virginia.
of the State of West Virginia,)	
<i>Respondents.</i>)	

BRIEF FOR PLAINTIFF IN ERROR AND PETI-
TIONER.

STATEMENT OF THE CASE.

I.

This case is pending upon a writ of error allowed by the late Mr. Chief Justice White on the 10th day of March, 1921, and has been matured for hearing upon said writ in accordance with the rules of this court. There is also pending a petition for a writ of *certiorari*, filed by the plaintiff in error, as petitioner, against the defendants in error, as respondents, to review and reverse in part the final decree, of the Supreme Court of Appeals of West Virginia, in the same case as that in which the writ of error was obtained. The petition for a writ of *certiorari* was filed after the allowance of the writ of error, and after due notice, application for such writ of *certiorari* was made to this court on the 2nd day of May, 1921, upon the petition therefor duly filed on the 8th day of April, 1921, which application is still pending, this court having made an order on or about the 16th day of May, 1921, directing that the decision on said motion for a writ of *certiorari* be deferred until the hearing on said writ of error. The attempt to obtain a review and reversal of the decision and decree of the Supreme Court of Appeals of West Virginia by both writs of error and *certiorari* is occasioned by the uncertainty as to which of said remedies is proper under the language of Section 237 of the Judicial Code, taking into consideration the disposition of the case made by the Supreme Court of Appeals of West Virginia in the suit by the plaintiff in error challenging the validity of a statute of said state upon the ground of its alleged repugnance to the Constitution of the United States. This brief is therefore filed on behalf of United Fuel Gas Com-

pany, and said Company will hereinafter be referred to as the "plaintiff in error", but it is respectfully requested that the same be treated as the brief of said Company as petitioner for said writ of *certiorari*, in the event this court shall determine that the latter is the appropriate remedy.

II.

On the 26th day of August, 1919, this suit was commenced in the Circuit Court of Kanawha County, West Virginia, a court of general jurisdiction in said state; whereupon said United Fuel Gas Company, plaintiff in error, filed in said court its bill in equity against Walter S. Hallanan, State Tax Commissioner, and E. T. England, Attorney General, of said state, praying an injunction against said officials, the defendants therein, restraining them from enforcing or attempting to enforce against the plaintiff in error the provisions of a certain statute of the State of West Virginia, entitled "Chapter V of the Acts of the Legislature of said State, Extraordinary Session of 1919", and founding its claim of a right to such injunction upon the alleged ground that said statute was invalid, among other reasons, because repugnant to the Constitution of the United States, and particularly Article I, Section 8 thereof, and the Fourteenth Amendment (Record, pp. 18-19). Said statute, the validity of which was challenged, is entitled:

"AN ACT to levy a privilege tax on any person, firm or corporation engaged in the transportation of crude oil or petroleum, or the distillates thereof, or of natural gas, by means of pipe lines, authorizing the State Tax Commissioner to provide rules and regulations for the collection of such

tax, and defining the duties of the State Tax Commissioner hereunder."

The full text of said statute is exhibited as an appendix to this brief. Both the said statute and the rules and regulations promulgated by said State Tax Commissioner were exhibited with said bill of complaint (Record, pp. 24-28). The said statute will be hereinafter referred to as the "transportation tax act."

The answer of the defendants in error denied that said statute was invalid, and denied that the same, or any part thereof, was in violation of the provisions of the Constitution of the United States (Record, pp. 37-38).

The final decree of the Circuit Court of Kanawha County granted the prayer of the bill, and adjudged the said transportation tax act to be wholly null and void as to the plaintiff in error and its business, upon the ground that said act was in violation of the commerce clause of the Constitution of the United States, and also because of the uncertainty and indefiniteness of said statute, and the defendants were by said final decree of the Circuit Court of Kanawha County perpetually enjoined from enforcing the said statute against the plaintiff in error (Record, pp. 63-64). The defendants in error appealed from said final decree of the Circuit Court to the Supreme Court of Appeals of West Virginia, and moved the latter court to reverse said decree (Record, pp. 65-67). Upon the argument in both state courts the plaintiff in error asserted and relied upon the provisions of the Federal Constitution above referred to, and both said state courts considered and decided upon said claims of the plaintiff in error based upon said Federal questions, the said Circuit Court deciding in favor of the contentions made by

the plaintiff in error and the said Supreme Court of Appeals deciding in part against said contentions (Record, pp. 72-90).

The decree of the Supreme Court of Appeals was originally made on the 26th day of November, 1920, and having been suspended pending the application of plaintiff in error for a rehearing, was made absolute and final by an order entered January 12, 1921, denying the petition for a rehearing (Record, p. 91). Said final decree of the Supreme Court of Appeals reversed in part and affirmed in part the decree of said Circuit Court, and with a view of saving the constitutionality of the transportation tax act, construed the same as imposing a tax upon the transportation of oil and natural gas only when the same was so transported in *intrastate* commerce, as such "intrastate commerce is defined by the written opinion filed" in the case by that court (Record, p. 71). It is claimed by the plaintiff in error that in and by the opinion and final decree of said Supreme Court of Appeals, a large part of the business conducted by plaintiff in error in interstate commerce was erroneously adjudged to be intrastate commerce as defined in said opinion. Said final decree and decision of said Supreme Court of Appeals also adjudged the said transportation tax act as not void for uncertainty and indefiniteness and not in violation of the Fourteenth Amendment to the Federal Constitution or any other provisions thereof (Syl. 7 and 8, record, p. 73).

III.

SUBSTANCE OF THE TRANSPORTATION TAX ACT.

The statute was passed by the Legislature of West Virginia at its extraordinary session in the year 1919, and by its terms was to become effective on the 1st day of July, 1919. It provides for and requires a license to be obtained by paying in advance what is termed "an annual privilege tax" as a condition for engaging or continuing to engage after the 1st day of July, 1919, in the business of the transportation of crude oil or petroleum, or the distillates thereof, or of natural gas, by means of pipe lines. The plaintiff in error had been for a number of years previous to the enactment of said statute, and still is, engaged in the transportation of natural gas by means of pipe lines, but it was not at any time engaged in such transportation of crude oil or petroleum, or the distillates thereof, so that there is involved in this suit the validity of said statute as applied to the business of the plaintiff in error in the transportation of natural gas by means of pipe lines. For convenience, therefore, the full text of said statute is reproduced below, in so far as it relates to the transportation of natural gas, omitting only such parts as relate to crude oil or petroleum, or the distillates thereof:

"Be it enacted by the Legislature of West Virginia:

"Section 1. No person, firm or corporation, hereinafter called company, after the first day of July, one thousand nine hundred and nineteen, shall engage in or continue in the business of the transportation of * * * natural gas, by means of

pipe lines, without the payment of an annual privilege tax hereby imposed for engaging in such business; provided, however, that nothing contained in this act shall apply to any person, firm or corporation engaged in the business aforesaid where the * * * natural gas, is by the entire system of such person, firm or corporation, transported a distance of less than ten miles.

"Sec. 2. Every person, firm and corporation engaged in this state in the transportation of * * * natural gas, * * * by means of pipe lines for sale to consumers within or without the state, or use within or without the state in the making of any products derived therefrom, shall pay to the state, as an annual privilege tax for engaging in such business in the state, * * * one-third of one cent for each thousand cubic feet of such natural gas as is so transported or conveyed within this state. Provided, that only one such tax, annually shall be required to be so paid.

"Sec. 3. Every person, firm or corporation liable to tax imposed by this act, shall, within sixty days after the first of July, one thousand nine hundred and nineteen, and within sixty days after the first day of July in each year thereafter, deliver to the State Tax Commissioner a return in writing showing the quantity * * * of natural gas transported or conveyed within this state during the fiscal year ending on the first day of July next preceding. Such return shall be signed and sworn to by the person making the same for him-

self or a partnership, and by the president, vice-president or other principal accounting officer making the same for a corporation, which return shall be in the form prescribed by the State Tax Commissioner. The State Tax Commissioner is hereby invested with full power and authority and it is hereby made his duty to prescribe forms for returns and assessments and to make, issue and put in force all necessary and needful rules and regulations for ascertaining and assessing the tax hereby imposed upon every company.

"Sec. 4. The State Tax Commissioner shall ascertain and assess the tax upon the company making return, and shall notify it of the amount of such tax by notice deposited in the post office addressed to such company at its principal office or place of business. Such ascertainment of the tax shall be final and conclusive, unless the same be appealed from in the manner following within thirty days after such notice is so deposited. If any company fail or refuse to make return, the State Tax Commissioner shall proceed, in such manner as may be proper, **to obtain the facts and information** required to be furnished by such return; and to this end he may, by himself or his duly appointed agent, make examination of the books, records and papers of any such company, and may take the evidence, on oath, of any person who he may believe shall be in possession of facts or information pertinent to the subject of inquiry, which oath he or the agent so appointed by him may administer. As soon as possible after

procuring such information as he may be able to do with respect to any company failing or refusing to make a return, the State Tax Commissioner shall proceed to ascertain and assess the tax upon such company, and shall notify it of the amount thereof as hereinbefore provided. And his act shall be final as to any company which refused to make a return.

"Sec. 5. If any such company, making a return as provided by this act, feels aggrieved by the assessment so made upon it for any year by the State Tax Commissioner, it may apply to the Board of Public Works by petition in writing, within thirty days after notice is deposited as provided in the preceding section, for a hearing and a correction of the amount of the tax so assessed upon it by the State Tax Commissioner, in which petition shall be set forth the reasons why such hearing should be granted and the amount such tax should be reduced. The board shall promptly consider such petition, and may grant such hearing or deny the same. If denied, the petitioner shall be forthwith notified thereof; if granted, the board shall notify the petitioner of the time and place fixed for such hearing. After such hearing the board may make such order in the matter as may appear to them just and lawful, and shall furnish a copy of such order to the petitioner.

"Sec. 6. No injunction shall be awarded by any court or judge to restrain the collection of all or any part of the taxes imposed and assessed under

this act, except upon the ground that the assessment thereof was in violation of the constitution of the United States, or of this state; or, that the same were fraudulently assessed; or, that there was a mistake made in the amount of taxes assessed; and in case of a mistake no such injunction shall be awarded, unless application shall be first made to the Board of Public Works to correct the alleged mistake, and the board shall refuse to do so, which fact shall be stated in the bill or unless the complainant pay into the treasury of the state all taxes appearing by the bill of complaint to be owing.

"Sec. 7. Every company so assessed with taxes shall pay the same into the state treasury within sixty days after the date of the mailing of the notice of the amount thereof, or within thirty days after notification of the amount thereof, when ascertained and assessed by the Board of Public Works on appeal. All taxes assessed under provisions of this act against any such company shall constitute a debt to the state, and may be collected by action of assumpsit or appropriate judicial proceeding, which remedy shall be in addition to all other existing remedies for the collection of taxes. It shall be the duty of the State Tax Commissioner to proceed to collect such taxes with a penalty of ten per centum added thereto, if not paid when due. At the time of paying the taxes the State Tax Commissioner shall issue to the company paying the same a certificate of payment for the proper fiscal year.

"Sec. 8. Any person required or authorized by law to make, sign or verify any return by this act, who makes any false or fraudulent return or statement with intent to defraud the state or defeat or evade the payment of the tax or any part thereof, imposed by this act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred dollars, nor more than five thousand dollars, to which fine shall be added the costs of prosecution.

"Sec. 9. Any person engaging or continuing in the business aforesaid without having first secured a license, as hereinbefore provided, shall be liable to a fine of not less than one thousand dollars nor more than ten thousand dollars.

"Sec. 10. All acts and parts of acts inconsistent herewith are hereby repealed."

The tax so provided was not in lieu of any other tax, but was in addition thereto. Under the laws of West Virginia the plaintiff in error was assessed with a general property tax upon the actual value of its property, which tax for the year 1918 amounted to \$208,355.27; a tax denominated a license tax upon its charter as a corporation, which for the year 1918 was \$1,690.00; a tax termed a special excise tax for the privilege of conducting its business as a corporation in the state, which for the year 1918, at the rate of three-fourths of one per cent. of its net income from sources in West Virginia, amounted to \$17,675.17; and a tax designated as its proportion of

the expense of operating the Public Service Commission of the state, amounting in said year to \$2,700.00.

IV.

NATURE OF THE BUSINESS OF PLAINTIFF IN ERROR IN THE TRANSPORTATION OF NATURAL GAS.

The bill of complaint of the plaintiff in error sets forth in detail the character of the business conducted by it in the transportation of natural gas, and exhibits a map of its transportation system (Record, p. 29). Certain of the pipe lines are used for transportation of gas from wells in West Virginia to (a) various localities in the same state where it is sold to consumers, (b) to points in adjoining states, (c) to other points in West Virginia, where it is delivered into the connecting pipe lines of purchasers extending into adjoining states, and by such purchasers further transported, without stoppage for any purpose, chiefly to points outside West Virginia, where it is sold for consumption. So much of said business as consists of the transportation of said gas from wells in West Virginia to localities in the same state, where it is sold for consumption, is conducted by plaintiff in error as a public utility under the laws of West Virginia, regulated by the Public Service Commission of the state, and generally by franchises from various municipalities in which service is furnished with the resulting obligations preventing voluntary withdrawal from the business. The record shows the various quantities of natural gas, determined as hereinafter stated, transported by plaintiff in

error for the several purposes above mentioned during the year ending July 1, 1919.

During said year ending July 1, 1919, the plaintiff in error owned and operated a number of gas-producing wells located upon lands, the natural gas under which was either owned by it in fee or held by it under lease for the purpose of producing such natural gas. The greater part of these gas-producing wells are located in the State of West Virginia, but a part thereof are in the State of Kentucky. By the method of measurement hereinafter stated, the entire quantity produced by plaintiff in error during said year, from wells owned and operated by it, was 41,700,973 M cubic feet, approximately 46,866,953 M cubic feet of which was produced from wells located in West Virginia, and approximately 834,000 M cubic feet from wells located in Kentucky. During the same year the plaintiff in error purchased from other producers, near the points of production, 13,172,615 M cubic feet, of which total purchased quantity approximately 12,762,838 M cubic feet was produced from wells in the State of West Virginia and purchased by plaintiff in error in said state, and approximately 409,777 M cubic feet from wells in the State of Kentucky, and purchased by plaintiff in error in said last mentioned state. The total quantity of natural gas so produced and purchased during said year, being 53,629,791 M cubic feet, was transported through pipe lines owned and operated by the plaintiff in error as owner of the said gas and not as carrier only, for the purposes and in the manner described below:

(a) 11,590,656 M cubic feet was transported from the points of production to consumers there-

of in the State of West Virginia, and of this quantity so consumed in West Virginia, by far the greater part was produced from wells in said state, as to which no interstate transportation is claimed. A comparatively small part of the gas so consumed in West Virginia was transported by plaintiff in error into said state from wells located in the State of Kentucky, but the exact amount of Kentucky gas brought into West Virginia for consumption does not appear in the record.

(b) 3,229,358 M cubic feet was transported from wells located chiefly in West Virginia, but some of which are in Kentucky, to purchasers and consumers of the same in the State of Ohio. This transportation into Ohio from West Virginia and Kentucky was, for the entire distance, through pipe lines owned and operated by plaintiff in error.

(c) 6,971,446 M cubic feet was transported and sold directly to consumers in the State of Kentucky, through lines operated the entire distance by plaintiff in error, from wells in West Virginia and Kentucky, more than one-half of said quantity being from wells in West Virginia and transported across the boundary line between that state and Kentucky.

(d) 1,598,980 M cubic feet produced chiefly from wells in West Virginia, but partly from wells in Kentucky, was transported for the entire distance through pipe lines owned and operated by

plaintiff in error, to a point in the State of Ohio near the City of Portsmouth, and there delivered by plaintiff in error to the Portsmouth Gas Company, which latter Company distributed the same to consumers thereof in said City of Portsmouth.

(e) 4,251,403 M cubic feet, of which at least one-half was produced from wells in West Virginia and the remainder from wells in Kentucky, was transported by plaintiff in error, through pipe lines owned and operated by it the entire distance, from the points of production to a point in the State of Kentucky, known as Inez, where it was delivered partly to Louisville Gas & Electric Company and partly to Central Kentucky Natural Gas Company, for further transportation by those companies to consumers thereof in the State of Kentucky.

(f) 10,283,019 M cubic feet was produced by plaintiff in error entirely from wells located in the State of West Virginia, and transported thence to a point at or near the boundary line between said state and the State of Ohio, where it was delivered to the Ohio Fuel Supply Company for further continuous transportation, by means of a connecting pipe line of the purchaser, of the entire quantity so delivered, to localities in Ohio where it was sold by said Ohio Fuel Supply Company to consumers.

(g) 7,567,353 M cubic feet was produced by the plaintiff in error entirely from wells located in the State of West Virginia, and transported thence to

another point in the same state where it was delivered to the Columbia Gas & Electric Company for further continuous transportation by said latter company for sale in the states of Kentucky and Ohio, except as to not more than 1% thereof, which was by said purchaser resold for consumption along the route of said pipe line.

(b) 7,961,333 M cubic feet and 7,270,429 M cubic feet, respectively, was produced by the plaintiff in error entirely from wells located in the State of West Virginia, and transported thence to another point in said state, where it was delivered to Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, respectively, mainly for further transportation by said two last named companies, through connecting pipe lines, into the State of Pennsylvania, there to be sold by them, except that in the case of said Hope Natural Gas Company about 33% of the quantity so delivered to it and in the case of said Pittsburgh & West Virginia Gas Company about 12%, was by said purchasing companies resold to consumers along their lines in West Virginia.

It is claimed by the plaintiff in error that its operations in the transportation of said natural gas during said year, as above set forth, were transactions in interstate commerce, except only as to that part of the 11,509,656 M cubic feet mentioned under (a) above as having been transported from the sources of production in West Virginia to points of consumption in the same state, which latter is conceded to be intrastate business. On the

other hand, it was practically conceded by the defendants in error that in the cases mentioned above under (b), (c), (d) and (e), being the cases in which the plaintiff in error transported the gas from the state in which it was produced to another state, through its own lines for the entire distance, the transportation was in interstate commerce, but they claim that the transportation under (f), (g) and (h) above, being the four instances in which the plaintiff in error did not transport the gas through its own pipe lines the entire distance from the point of production in West Virginia to points outside the state, but delivered it to other companies for further transportation by them chiefly to points outside the state, was purely intrastate commerce so far as concerned the plaintiff in error.

It should be noted here, as to the instances in which the plaintiff in error transported the gas from the points of production in West Virginia to other points within the same state where it was delivered to other companies chiefly for further transportation outside the state, that there was no interruption of the flow of the gas at the points of delivery by the plaintiff in error to the purchasing companies, or at any other point within the state. This transportation by plaintiff in error of gas for delivery to said four purchasing companies inside the State of West Virginia was in each case under and in pursuance of a contract between the plaintiff in error and each of said purchasing companies, separately, which required the latter to construct, and each of them had constructed previous to the year in question, a connecting pipe line extending from an adjoining state to the terminus of the pipe line of the plaintiff in error in West Virginia, for the purpose of transporting by continuous pipe line, to

localities outside the State of West Virginia, the gas so sold by the plaintiff in error to said four companies, for sale by the latter to consumers of such gas outside the State of West Virginia, except the comparatively small portion of such gas which it was contemplated would be sold and has been sold by three of said purchasing companies along their lines in West Virginia. One of the purchasing companies, the Ohio Fuel Supply Company, transports the entire quantity received by it to points outside the state; another, the Columbia Gas & Electric Company, transports into other states at least 99% of the quantity received by it; and of the remaining two companies, one transports outside the state about 67% of the quantity received by it, and the other about 88%. At the several delivery points devices are maintained which measure the quantities upon certain pressure bases provided for in the contracts, while the gas is in transit, and the gas is in constant motion toward its ultimate destination from the time it leaves the wells until it reaches the consumer in the state of its destination. Said contracts for the sale of gas by the plaintiff in error to said four companies were in existence long before the passage of the transportation tax act, and each of them covers a period of a number of years yet to come, requiring the plaintiff in error to deliver the gas at a fixed price per thousand cubic feet. Two of the purchasing companies, however, own all of the capital stock of the plaintiff in error, and in the case of the other two the contracts permit the plaintiff in error to charge the purchasers with one-half of the amount of the tax imposed by the transportation tax act, provided such tax is lawful.

The entire system of pipe lines operated by the plaintiff in error greatly exceeds a distance of ten miles in

length, and more than 75% of all the gas transported by it through pipe lines is so transported a distance of more than ten miles, so that the plaintiff in error does not come within the exception provided in the statute.

The foregoing statement of the various quantities of gas transported by plaintiff in error during the year ending July 1, 1919, is a statement of such amounts as determined from the measurements made in the sale thereof, under the circumstances and at the pressures provided for in the contracts of sale, which contracts are in some cases based upon a pressure of eight ounces and in other instances of ten ounces, to the square inch. The gas is, however, actually transported by plaintiff in error at widely varying pressures, ranging from above four hundred pounds to less than four ounces to the square inch, this being a necessary incident of practical transportation. The failure of the transportation tax act to specify the pressure at which the measurement should be made for determining the amount of the tax, is the basis of the claim that said act is void for uncertainty and indefiniteness, since the term "one thousand cubic feet" used in the statute is meaningless without a specification of the pressure, gas having the quality of indefinite expansion.

The plaintiff in error was incorporated under the laws of West Virginia on the 1st day of February, 1916, but is the successor in all respects of another West Virginia corporation of the same name, incorporated on March 7, 1903, and its said predecessor was so incorporated with the intention on the part of its stockholders to utilize the same in connection with, and as a subsidiary of, the Ohio Fuel Supply Company, and the primary purpose of the incorporation of said predecessor was that it should

acquire, hold, operate and maintain a reserve supply of natural gas in West Virginia for the consumers of said Ohio Fuel Supply Company, all residing in the State of Ohio. The plaintiff in error is, however, a public utility corporation under the laws of West Virginia by reason of its charter and the character of the business in which it is engaged, and is subject to the laws of said state as such corporation.

Other details with respect to the character of the business of the plaintiff in error appear in the record, but are omitted here because not believed to be material upon the questions reviewable in this court.

V.

DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA UPON THE QUESTIONS OF WHETHER THE TRANSPORTATION TAX ACT WAS VALID OR INVALID UNDER THE COMMERCE CLAUSE OF THE FEDERAL CON- STITUTION OR THE FOURTEENTH AMEND- MENT, AS APPLIED TO THE SEVERAL KINDS OF BUSINESS CONDUCTED BY THE PLAIN- TIF IN ERROR IN THE TRANSPORTATION OF NATURAL GAS.

From the foregoing statement of the material facts of this case, no issue of fact appears. Certain allegations of the bill of complaint were not denied by the defendants in error, and for this reason are admitted to be true, Section 4790 of Chapter 125 of the Code of West Virginia providing that: "Every material allegation of the bill not controverted by an answer, and every material allegation of new matter in the answer constituting a claim for affirmative relief, not controverted by a special re-

ply in writing, shall for the purposes of the suit, be taken as true, and no proof thereof shall be required." All allegations of the bill as to matters of fact, as distinguished from conclusions of law, which were denied by the answer, are no longer in dispute, because of the fact that a stipulation fully covering these controverted matters was made a part of the record (pp. 50-56).

The Supreme Court of Appeals of West Virginia decided that the transportation tax act was valid, after first making a construction thereof designed to meet the objections that it was violative of the Federal Constitution, the court holding in substance that, notwithstanding the statute upon its face levied a tax upon the transportation of natural gas, "by means of pipe lines, for sale to consumers within or without the state", and measured the amount of the tax by the quantity of gas so transported or conveyed within the state, it was, nevertheless, not intended by the Legislature to be assessed upon transportation in interstate commerce, because the court presumed that the Legislature did not intend an unconstitutional act. Specifically it was held, with reference to the business of the plaintiff in error, that the statute applied to, and the tax should be measured by, only the following parts of the business, namely: that described under IV (a), (g) and (h) above; that is to say, the gas transported from the points of production in West Virginia to consumers in the same state entirely through the lines of the plaintiff in error, and the gas transported from the points of production in West Virginia to other points in said state, where it was delivered to Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company for further transportation by said last mentioned companies to points

chiefly outside the state; that, notwithstanding the transportation for delivery to these three companies was under contracts contemplating and requiring the purchasers to build connecting lines from points outside the state, which were afterwards actually built, and that said gas was actually transported outside the state by the purchasing companies in the regular course of their business, by means of continuous pipe lines, without interruption of the flow, except for the comparatively small portions sold along the interstate pipe lines, yet the entire quantity delivered by the plaintiff in error to each of said three companies was transported by plaintiff in error in intrastate commerce, and therefore subject to the tax. The court decided that those parts of the business described under IV (b), (c), (d), (e) and (f) above, being the instances in which the plaintiff in error, through its own pipe lines for the entire distance, transported gas from the state in which it was produced to another state, and the instance in which it delivered a certain quantity to the Ohio Fuel Supply Company near the boundary line between Ohio and West Virginia, the whole quantity so delivered being further transported by the purchaser into the State of Ohio, were transactions in interstate commerce and should be excluded in computing the amount of the tax. The court made a distinction in the case of the gas delivered to the Ohio Fuel Supply Company and that delivered to the three other purchasing companies in the State of West Virginia, upon the ground that in the case of the Ohio Fuel Supply Company the entire quantity purchased by it was by the purchaser transported outside the state, while in the case of the deliveries to the three other purchasing companies certain percentages thereof were resold by the purchasers

along their lines in West Virginia used for transporting such purchased gas chiefly to points outside the state.

It will be seen therefore that this appellate proceeding involves the validity of the entire statute under the Commerce Clause and under the Fourteenth Amendment, and the decision on these issues being in favor of the validity of the statute, it is reviewable by writ of error. Should this court, however, overrule the contentions of the plaintiff in error which go to the validity of the statute in its entirety, then the further questions arise as to the character of the commerce, whether interstate or not, represented by the gas transported by plaintiff in error, for sale and delivery at points in West Virginia, to Columbia Gas & Electric Company, Hope Natural Gas Company, and Pittsburgh & West Virginia Gas Company, respectively, for further transportation, by the purchasing companies, chiefly to localities outside said state. The decision of the West Virginia Supreme Court of Appeals upon these latter questions, at least if presented separately from the other issues, may be reviewable only by *certiorari*.

SPECIFICATION OF ERRORS.

The errors in the decision and decree of the West Virginia Supreme Court of Appeals relied upon by plaintiff in error to reverse said decree may be stated more briefly than in the formal assignment of errors, as follows:

1st. In holding that the Transportation Tax Act, as construed by said state court, was not in violation of the Commerce Clause of the Federal Constitution.

2nd. In holding that the said Act was not in violation of the Fourteenth Amendment to the Federal Constitution.

3rd. In holding that the Transportation Tax Act, as construed by said Court, imposes a tax upon the business of transporting natural gas, only when such transportation is in intrastate commerce measured by the amount of such commerce.

4th. In holding that the business conducted by plaintiff in error, as set forth in its bill of complaint, in the transportation of natural gas from the points of production thereof in the State of West Virginia to another point in said State, in performance of a contract for the sale and delivery of such natural gas at such latter point to Columbia Gas & Electric Company, by means of its connecting pipe line, to points outside the State of West Virginia, there to be sold and consumed, was not a transaction in interstate commerce on the part of the plaintiff in error.

5th. In holding that the business conducted by plaintiff in error, as set forth in its bill of complaint, in the transportation of natural gas from the points of production thereof in the State of West Virginia to another point in said State, in performance of a contract for the sale and delivery of such natural gas at such latter point to Hope Natural Gas Company, by means of its connecting pipe line, to points outside the State of West Virginia, there to be sold and consumed, was not a

transaction in interstate commerce on the part of plaintiff in error.

6th. In holding that the business conducted by plaintiff in error, as set forth in its bill of complaint, in the transportation of natural gas from the points of production thereof in the State of West Virginia to another point in said State, in performance of a contract for the sale and delivery of such natural gas at such latter point to Pittsburgh & West Virginia Gas Company, by means of its connecting pipe line, to points outside the State of West Virginia, there to be sold and consumed, was not a transaction in interstate commerce on the part of plaintiff in error.

7th. In reversing, in part, the decree of the Circuit Court of Kanawha County, West Virginia, which decree enjoined the defendants in error from enforcing any part of the Transportation Tax Act against plaintiff in error.

POINTS OF ARGUMENT.

1st. This suit was brought to challenge the validity of a state statute upon the ground of its repugnance to the Federal Constitution, and the decision of the highest state court being in favor of the validity of said statute, the final decree is reviewable in this court upon writ of error.

Judicial Code, Section 237;

Merchants National Bank v. City of Richmond,
decided June 6, 1921, Advance Sheets July 15,
1921.

2nd. Natural gas is an article of commerce, and its transportation from one state to another for sale, or in compliance with a contract for its sale and delivery, is interstate commerce.

West v. Kansas Natural Gas Co., 221 U. S. 229;
Public Utilities Commission v. Landon, 249 U.
S. 236;

*Pennsylvania Gas Co. v. Public Service Com-
mission*, 252 U. S. 28.

People ex rel., etc., v. Sare, 229 N. Y. 446.

3rd. The transportation of commercial articles from one state to another, for sale, is none the less *interstate* commerce merely because accomplished by two or more connecting carriers or agencies, one or more of which operates within the limits of a single state.

The Daniel Ball, 10 Wall 557;

Railroad Co. v. Illinois, 118 U. S. 557;

Railroad Co. v. Pennsylvania, 136 U. S. 114;

Railroad Commission v. Railroad Company,
229 U. S. 336;

Railroad Company v. Harold, 241 U. S. 371.

4th. In determining whether commerce is *inter-
state* or *intrastate*, regard must be had to its
essential character—mere billing or the place at
which title passes is not determinative.

Public Utilities Commission v. Landon, supra;
Penn. R. R. Co. v. Clove Bros., 238 U. S. 466;
Swift v. U. S., 196 U. S. 398;
Western Oil Co. v. Lipscomb, 244 U. S. 346;
Western Union Tel. Co. v. Foster, 247 U. S. 112.

5th. The transportation and sale of natural gas by plaintiff in error to three other companies, chiefly for further transportation by the purchasers to points outside of the State of West Virginia, under contracts contemplating such interstate transportation, in the course of a regularly established business, were transactions in interstate commerce, to the extent that said gas was intended to be and actually was transported outside the state, notwithstanding said gas was delivered by plaintiff in error to the purchaser in the State of West Virginia, and notwithstanding a comparatively small portion of the entire quantity so delivered was resold by the purchasers to consumers along their lines in West Virginia.

Public Utilities Commission v. Landon, supra;
Pennsylvania Gas Co. v. Public Service Commission, supra;
Ohio R. R. Commission v. Worthington, 225 U. S. 201.

6th. The intrastate business of plaintiff in error in the transportation of gas from the points of production in West Virginia to other localities in the same state, where it is sold to consumers, is conducted by plaintiff in error as a public service

regulated by the Public Service Commission of said state and generally under obligations created by franchises from municipalities. The same pipe lines are used for the transportation of gas in this service as those used for its transportation to points outside the state.

Plaintiff in error, therefore, not having power voluntarily to withdraw from a public service in West Virginia, is required by the decision under review to pay the tax upon its intrastate business as a condition precedent to continuing the interstate transportation in which it is engaged.

Pullman Co. v. Adams, 189 U. S. 420;

Allen v. Pullman Co., 191 U. S. 171;

Borman v. Continental Oil Co., decided June 6, 1921, Advance Sheets July 15, 1921.

Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113.

8th. The arbitrary power given to the State Tax Commissioner by the statute in question, resulting from the failure of said statute to provide a definite measure of the said tax, operates to deprive plaintiff in error of its property without due process of law and to deny to it the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States.

Yick Wo. v. Hopkins, 118 U. S. 356.

ARGUMENT.

First. This suit was brought to challenge the validity of a state statute on the ground of its repugnance to the Federal Constitution, and the decision of the highest state court being in favor of the validity of said statute, the final decree is reviewable in this court upon writ of error. It is believed that the authorities cited for this proposition sustain the same, but if the court shall determine otherwise, then the decree of the Supreme Court of Appeals of West Virginia can be corrected and reversed upon the pending application for a writ of *certiorari*.

Second. Natural gas is an article of commerce, and its transportation from one state to another for sale, or in compliance with a contract for its sale and delivery, is interstate commerce.

The most recent case in this court in which this subject was considered is that of *Pennsylvania Gas Company v. Public Service Commission*, 252 U. S. 28, in which it is said: "We think that the transmission and sale of natural gas produced in one state, transported by means of pipe lines, and directly furnished to consumers in another state, is interstate commerce within the principles of the cases already determined by this court." And in the previous case of *Public Utilities Commission v. London*, 249 U. S. 236, it was said: "That the transportation of gas through pipe lines from one state to another is in interstate commerce may not be doubted." The specific ruling in the case of *Pennsylvania Gas Company v. Public Service Commission* was that the transportation of

natural gas from one state to another, for sale directly to consumers in the state of its destination, was interstate commerce, while in the case of *Public Utilities Commission v. Landon* it was held that the transportation from one state to another, for delivery to a distributing company in the state where the gas was destined, was interstate commerce so far as the activities of the transportation company in connection therewith were concerned, although it was held that the distribution by the receiving company was local commerce.

The business of the plaintiff in error in the instant case consists partly in transporting gas from the points of production in West Virginia directly to consumers thereof in adjoining states, and partly in its transportation from such points of production in West Virginia into another state, where it is delivered to other companies, by whom it is distributed. In addition to both these branches of its business, it also produces and purchases natural gas in West Virginia, which it transports through its own pipe lines to certain other points in the state, where it is delivered to four other companies, chiefly for further continuous transportation by the purchasers to points outside the state. In the case of one of the purchasers, being the Ohio Fuel Supply Company, the delivery is made near the boundary line between Ohio and West Virginia, and the Ohio Fuel Supply Company transports the entire quantity so received by it from the plaintiff in error into the State of Ohio, for sale to consumers in the latter state. The Supreme Court of Appeals of West Virginia held that all of the gas transported by the plaintiff in error from West Virginia directly through its own lines into another state, for sale to consumers, all the gas transported by plaintiff in error entirely through its own

lines into another state for delivery in such other state to another transportation company or distributing company, and all of the gas delivered by the plaintiff in error to Ohio Fuel Supply Company, was transported by the plaintiff in error in interstate commerce, and not subject to the tax in question. The Supreme Court of Appeals decided, however, that so much of the business of the plaintiff in error as consisted in transporting gas from wells in West Virginia to certain other points in said state, where it was delivered, under a previous contract of sale, to Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, for further transportation by the purchasers chiefly to points outside the state, there to be sold and consumed, was not interstate commerce on the part of the plaintiff in error. Upon this branch of the argument, therefore, it seems unnecessary to discuss the character of any part of the business of the plaintiff in error, except that involved in the sale of natural gas to said three purchasing companies within the State of West Virginia, which the West Virginia court held to be intrastate commerce, and the circumstances in connection with this business will be hereinafter referred to.

For the year in question, the plaintiff in error transported from the sources of production in West Virginia, through a pipe line owned and operated by it, 7,567,353 M cubic feet of natural gas to another point in the same state, where it was delivered to Columbia Gas & Electric Company for further continuous transportation by said latter Company for sale in the States of Kentucky and Ohio, except as to not more than 1% thereof which was by said Columbia Gas & Electric Company resold along its line in the State of West Virginia. Similarly, in the

same year the plaintiff in error transported, through its own pipe line from wells in West Virginia, 15,231,762 M cubic feet of natural gas to another point in said state, where 7,961,333 M cubic feet thereof was delivered to Hope Natural Gas Company and the remaining 7,270,429 M cubic feet to Pittsburgh & West Virginia Gas Company, for further continuous transportation by said two last named companies, through connecting pipe lines, into the State of Pennsylvania, there to be sold by them, except that in the case of said Hope Natural Gas Company 33% of the quantity so delivered to it, and in the case of the Pittsburgh & West Virginia Gas Company about 12%, was by said purchasing companies resold to consumers along their lines in West Virginia. With respect to the circumstances in connection with these transactions, it should be stated that for a number of years preceding the enactment of the transportation tax act there was produced in the State of West Virginia more natural gas than in any other state of the United States, and there was no market within the state for as much as one-half the production; that large transportation lines were constructed from various localities in the state to adjoining states, the lines constructed by the plaintiff in error being fully described in the bill of complaint (record, pp. 7-9). In the fifth paragraph of said bill of complaint (record, pp. 9-10), the following allegation is made, and not denied, with respect to the character of the business of the plaintiff in error in connection with the gas sold by it to said three companies:

“Of the total quantity, however, above mentioned, of 53,629,791 M cubic feet, produced by your orator or by other producers and purchased by your orator

in the State of West Virginia, approximately 42,000,000 M cubic feet was, during the year ending, July 1, 1919, transported across the boundary line of the State of West Virginia into the States of Kentucky, Ohio and Pennsylvania, in some instances entirely through pipe lines owned and operated by your orator, and in other instances by means of connecting pipe lines of companies to whom your orator sells such natural gas, and in each instance where the gas is sold by your orator to Ohio Fuel Supply Company, Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, it is by said purchasing companies transported into States adjoining the State of West Virginia, by means of connecting and continuous pipe lines, without interruption of its flow, the same being measured while in transit without stoppage or coming to rest for any purpose until it reaches the ultimate consumers and users thereof in the States of Kentucky, Ohio and Pennsylvania. The said gas so transported and sold by your orator to each of the four Companies above mentioned, is so transported and sold under contracts with said Companies, which in each case contemplated that the principal part of the gas sold was to be transported into States other than that in which it was produced, for sale and use in such other States, and each of said Companies, in the contract which it made with your orator for the purchase of said gas, bound itself to construct, and afterwards did construct, to the terminus of one or another of the main trunk lines hereinbefore mentioned as owned

and operated by your orator, a connecting pipe line for the purpose of transporting by continuous pipe line to localities outside of the State of West Virginia, for sale and use in said localities outside the State of West Virginia, the natural gas so sold by your orator to said purchasing companies respectively, except a comparatively small portion of such gas which it was contemplated would be sold and has been sold by each of said purchasing Companies along their lines in West Virginia."

And in paragraph nine of said bill of complaint (record. p. 14), the following:

"That the gas sold by your orator to the Ohio Fuel Supply Company, Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, as above referred to, is, in each instance, so supplied by virtue of a contract with such purchasing company, at a fixed price per thousand cubic feet for all of the natural gas so sold to each of said Companies; that all of said contracts were in existence long before the passage of said pretended statute levying said privilege tax upon the transportation of natural gas by pipe line in the State of West Virginia, and each of them covers a period of a number of years yet to come; that in and by each of said contracts with the four Companies above mentioned, it was contemplated and intended by the parties thereto, and your orator bound itself, to transport, by means of pipe lines in the State of West Virginia, large quantities of natural gas for

transportation by each of said purchasing Companies to localities in other States, there to be used and consumed, by means of continuous pipe lines from points where such natural gas was produced, and the said gas heretofore delivered and sold by your orator to said four several Companies, and which is now being so delivered and sold and will in the future be so delivered and sold, has been, is and will be transported mainly for sale and use at places outside the State of West Virginia and in other States of the United States, in commerce between such other States and the State of West Virginia. In the year ending July 1, 1919, your orator transported and delivered, for such interstate purposes, to the Ohio Fuel Supply Company 10,283,019 M cubic feet, to the Columbia Gas & Electric Company 7,567,353 M cubic feet, to Hope Natural Gas Company 7,961,333 M cubic feet, and to Pittsburgh & West Virginia Gas Company 7,270,429 M cubic feet of natural gas."

These facts are in no way controverted, but by stipulation it is agreed that certain percentages of the gas so delivered by the plaintiff in error to the Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company are by them resold in the State of West Virginia, to the extent above set forth. The Supreme Court of Appeals of West Virginia decided that the commerce involved in the sales to Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company was of a different character from that in the sale to Ohio Fuel Supply Company, because only in the case of the Ohio

Fuel Supply Company did the purchaser intend that the entire quantity of gas delivered to it should be transported to another state. As to the other three purchasing companies, the slightest quantities sold by the purchaser in the State of West Virginia, even the negligible quantity of not over 1% in the case of the Columbia Gas & Electric Company, was held to deprive the residue of its interstate character. The court says, in support of its conclusion that the business of plaintiff in error in delivering gas to said three purchasing companies was not interstate commerce, that: "At the time it was put in course of transportation it had no fixed destination other than the point of delivery to the purchasing company, that is to say, it was not known by the owner of the gas where it would ultimately go, as in case of the gas delivered to the Ohio Fuel Supply Company. It is true it appears that a large part of it was ultimately conveyed without the state and it was known at the time it was purchased that a large part would be sold without the state, but as to what part neither party to the contract at the time knew." It is submitted that this reasoning is unsound, and ignores the admitted facts above referred to as to the course of the business, the intention of the parties and the actual accomplishment of this intention by the transportation of the gas chiefly to other states.

In the case of *Public Utilities Commission v. Landon*, above referred to, the gas in question was being produced in the States of Kansas and Oklahoma and transported across those states for delivery to distribution companies supplying cities in both Kansas and Missouri, and in the case of *Pennsylvania Gas Company v. Public Service Commission*, the gas was all produced in the State of Pennsylvania and a pipe line operated from the point of

production across the boundary line to certain localities in the State of New York, various communities in Pennsylvania being supplied along the route of the line, and the remainder of the common supply transported to cities in the State of New York. In both these cases this court concluded that as to such part of the gas that crossed the state boundary line the transportation was interstate commerce, notwithstanding the fact that certain quantities were drawn off from the pipe line in each case and consumed in the state of its origin.

In the recent case of *People ex rel. Pennsylvania Gas Company v. Saxe et al.*, decided by the Court of Appeals of New York October 19, 1920, 229 New York Reports 446, there was involved a somewhat similar question with reference to a statute of the State of New York levying a tax upon the privilege of carrying on business in that state as a corporation, and in which the constitutionality of the statute was questioned by two natural gas companies, one of which transported all the natural gas sold by it in the State of New York from the State of Pennsylvania, and the other of which transported from Pennsylvania 74% of the gas sold by it in New York, the remaining 26% being produced in the latter state. The question before the court was whether a tax could be exacted by the State of New York for the privilege of conducting this business, and it was held as to the company which transported its entire supply from the State of Pennsylvania that its entire business was interstate commerce, while in the case of the company which imported from Pennsylvania 74% of the gas which it sold in New York, it was held that the tax should be prorated so as to be levied on the intrastate business only. In answer to the contention on the part of the state, in

the case of the company which imported a part of its gas, that the gas from Pennsylvania became commingled with that produced in New York and therefore lost its interstate character, the court said:

"We think, however, that deliveries through these mains as through the other are exempt from local burden as to the extent that the product is imported. As we pointed out in the matter of *Penn. Gas Co. v. Public Service Commission* (225 N. Y., 397, 402): 'The test to be applied will vary with the method of transportation and the subject of the sale.' Here the agency of the carriage is a pipe, and the subject of the sale a gas. A carload of grain transported from one State to another and consigned to a single purchaser will not lose its quality as a subject of interstate commerce if a bushel of grain is added to the shipment after crossing the State line. Gas transported from Pennsylvania, consigned to one distributor in Buffalo, does not become subject, without limit, to the taxing power of the locality because on the way there has been an infusion of an insignificant proportion of gas produced within the State. Receipts from sales of local gas make up about 26 per cent of the relator's business in New York, but only a minor part of this percentage represents sales of the home product transported through the mains that carry gas from Pennsylvania. Most of the home product is consumed by the localities in the neighborhood of its source. We are unable to persuade ourselves that the incident has absorbed the principal; that the stream has lost

itself in the tributary, and that the infusion of the local product, while the imported one is still in transit, before the destination has been reached or a state of rest attained, makes severance of the business into its elements impossible, and fixes upon the transit as a whole the stamp of local commerce."

The authorities cited under the three points next following, demonstrate, we think, that the reasoning of the Supreme Court of Appeals of West Virginia is unsound in holding that the commerce conducted by the plaintiff in error with the three companies to which it sells gas in the State of West Virginia for further continuous transportation by the purchasers to points outside the state, is not interstate commerce.

Third. The transportation of commercial articles from one state to another, for sale, is none the less *interstate* commerce merely because accomplished by two or more connecting carriers or agencies, one or more of which operates within the limits of a single state.

The *Daniel Ball*, 10 Wall. 557;

Wabash, St. Louis & Pacific Ry. Co. v. Illinois,
118 U. S. 557;

Norfolk & Western R. Co. v. Pennsylvania, 136
U. S. 114;

*Railroad Commission of Ind. v. Teras & P. R.
Co.*, 229 U. S. 336;

Atchison, Topcka & Santa Fe Ry. Co. v. Harold,
241 U. S. 371.

Fourth In determining whether commerce is *interstate* or *intrastate*, regard must be had to its essential character—mere billing or the place at which title passes is not determinative.

Public Utilities Commission v. Landon, supra;
Penn. R. R. Co. v. Clore Bros., 238 U. S. 466;
Swift v. U. S., 196 U. S. 398;
Western Oil Co. v. Lipscomb, 244 U. S. 346;
Western Union Tel. Co. v. Foster, 247 U. S. 112.

Fifth. The transportation and sale of natural gas by plaintiff in error to three other companies, chiefly for further transportation by the purchasers to points outside of the State of West Virginia, under contracts contemplating such interstate transportation, in the course of a regularly established business, were transactions in interstate commerce, to the extent that said gas was intended to be and actually was transported outside the state, notwithstanding said gas was delivered by plaintiff in error to the purchaser in the State of West Virginia, and notwithstanding a comparatively small portion of the entire quantity so delivered was resold by the purchasers to consumers along their lines in West Virginia.

Public Utilities Commission v. Landon, supra;
Pennsylvania Gas Co. v. Public Service Commission, supra;
Ohio R. R. Commission v. Worthington, 225 U. S. 201.

The Supreme Court of Appeals seems to rest its decision that the sales by the plaintiff in error to said three purchasing companies was not interstate commerce,

solely upon the authority of *Arkadelphia Company v. St. Louis S. W. Ry. Co.*, 249 U. S. 134, and *McCluskey v. Railway Co.*, 243 U. S. 36, but it is readily seen that neither of these cases supports the conclusion, because in neither was there a shipment or movement of the subject of the commerce in an unbroken journey from one state to another but, on the contrary, there was a reshipment of the commodity after it had completed an intrastate journey and had come to a state of rest. Under the facts disclosed, the attempt to create in law a single journey out of two distinct journeys was denied. The case of *Ohio Railroad Commission v. Worthington*, 225 U. S. 201, is more pertinent. In that case the operator did not know that all the coal marked for lake shipment from Ohio mines would in fact be so shipped. Some of it might be sold before or after it reached lake ports, or a small quantity might be delivered on Ohio islands in Lake Erie. Yet it was held that the coal which was delivered into vessels for shipment beyond the State of Ohio was interstate commerce from the time it left the mine.

Sixth. The intrastate business of plaintiff in error in the transportation of gas from the points of production in West Virginia to other localities in the same state, where it is sold to consumers, is conducted by plaintiff in error as a public service regulated by the Public Service Commission of said state and generally under obligations created by franchises from municipalities. The same pipe lines are used for the transportation of gas in this service as those used for its transportation to points outside the state.

Plaintiff in error, therefore, not having power voluntarily to withdraw from a public service in West Vir-

ginia, is required by the decision under review to pay the tax upon its intrastate business as a condition precedent to continue the interstate transportation in which it is engaged.

The proposition advanced under this and the next following heading go to the validity of the entire tax as applied to the plaintiff in error. It is contended on behalf of the plaintiff in error that unless it is free to discontinue its admittedly intrastate business of supplying natural gas to consumers thereof in the State of West Virginia, then the payment of the tax assessed upon such intrastate business is made, by the terms of the transportation tax act, a condition precedent of the right of plaintiff in error to continue to engage in interstate commerce which it is conceded to be conducting. The holding of the Supreme Court of Appeals on this point is not entirely clear, although the effect of its decision is to deny the contention of the plaintiff in error. It is said in the opinion (record, p. 77): "If the act is to be construed as forbidding complainants from engaging in their interstate business, unless they procure the license therein provided for, it can not be sustained, and this construction the complainants insist is the only one consistent with the terms of the act." Later in the opinion (record, p. 80), it is said: "The complainants, if they desire to do so, under our view of the act, might carry on their interstate business, regardless of it, and so long as it did not engage in intrastate business, the penalties prescribed by the act would not apply to them." These statements, as abstract propositions, are plausible, but the court was pressed in argument to determine whether or not the plaintiff in error, which conducts its intrastate business as a public utility and under franchise contracts with municipalities, was

actually free to discontinue such intrastate business and thereafter continue its interstate transportation of natural gas. No further reference to the question is found in the opinion or decree beyond those quoted above, except that it is incidentally mentioned in a later paragraph of the opinion dealing with the character of the commerce in the sale of gas to the Ohio Fuel Supply Company, in the following language (record, p. 89): "Whatever may be said as to the duty or obligation of the United Fuel Gas Company as a public service corporation, or of the power of the Public Service Commission to require service from it to its patrons in West Virginia, it cannot be denied that to the extent that it delivers gas to the Ohio Fuel Supply Company, for consumption in Ohio, and which is destined to Ohio points at the time it is received by it, it is engaged in interstate commerce, and in such case is not subject to the tax imposed by this act."

All of the facts and circumstances concerning the business of plaintiff in error, necessary for the determination of this question, were before the court, and the fact that the intrastate business was conducted as a public utility, and under franchises from municipalities, was stipulated. We submit, as stated by this court in *Pullman Co. v. Adams*, 189 U. S. 420, that the company was entitled to know, when it was adjudged liable for the tax, whether or not it might relieve itself from future liability by discontinuing the business, the privilege of engaging in which was, under the decision, the only thing upon which the tax could be sustained. On this point we call particular attention to the decision in *Underwood Typewriter Company v. Chamberlain*, 254 U. S.

44 *United Fuel Gas Co. vs. Hallanan, Tax Comr.*

113, and *Bowman v. Continental Oil Co.*, decided June 6, 1921, Advance Sheets July 15, 1921.

Seventh. The arbitrary power given to the State Tax Commissioner by the statute in question, resulting from the failure of said statute to provide a definite measure of the said tax, operates to deprive plaintiff in error of its property without due process of law and to deny to it the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States.

In answer to this contention the Supreme Court of Appeals decided in point 7 of the syllabus prepared by it (record page 73) as follows:

"7. Chapter 5 of the Acts of the Extraordinary Session of the Legislature, 1919, imposing a tax upon the privilege of engaging in the business of transporting oil or gas by pipe lines is not invalid because it does not specify at what pressure the gas shall be measured for the purpose of the imposition of such tax. Any difficulty in administering the law on this account may be overcome by a regulation which the State Tax Commissioner is authorized by the provisions of the act to make."

The privilege tax imposed by the Act so far as it affects the plaintiff in error, is based solely on the amount of business done in the transportation of gas. It was as necessary to fix the unit of quantity as the money rate. This the Legislature thought it had done by defining the unit of measurement as "each thousand cubic feet", but evidently through the carelessness of the draftsman of

the law, the Legislature failed to note that a cubic foot of gas is meaningless without a statement of the pressure. A single cubic foot of gas at one pressure can become many cubic feet at a lower pressure and a fraction of a cubic foot at a higher pressure. It was a simple matter for the Legislature to have remedied this vital defect in the law by adopting a standard pressure for the measurement of all gas transported through pipe lines. And we think it is apparent that there can be no uniformity in the law as applied to every person, firm or corporation engaged in the business of the transportation of natural gas by means of pipe lines, unless a standard pressure is adopted. In no other way can transportation based on quantity be ascertained in an equal and uniform way. The truth of this proposition shows that the adoption of a standard pressure is a legislative function, and cannot be left to the arbitrary decision of the tax commissioner. The rate of taxation necessarily includes the unit of quantity. With as much propriety it could be argued that the money rate could be left to him. Regulations which the tax commissioner is authorized to make must be only administrative. To supply a vital defect in the law is not the exercise of administrative functions. If fixing the pressure under which gas is to be measured is an administrative regulation, then it is subject to change from year to year, and the rate as well as the total amount of taxes based thereon will fluctuate from year to year at the will and pleasure of the tax commissioner.

Discussing the question in its opinion, the Court said (record page 84):

"The gas company further insists that the act is invalid upon the ground of uncertainty, it not providing that the measurement of the gas shall be made at a particular pressure, and that inasmuch as it transports gas under varying pressures the amount would be increased or decreased as the pressure under which the same was transported was increased or decreased. The act confers upon the State Tax Commissioner authority to make such regulations as may be necessary for its proper administration, and it may be said that if this suggested question presents any difficulty in that regard, it could be, or would be covered by a regulation of the State Tax Commissioner. We think however, it is a sufficient answer to the objection that this gas, so far as it is purchased is purchased by measurement, and is sold, measured by the thousand cubic feet, and we have never heard, nor are we informed in the record, that the complainant gas company has ever had any difficulty in collecting from its customers, because of uncertainty in the amount of gas delivered. If this basis of measurement can be applied by the company in a practical way in carrying on its business between it and its customers, it is a little difficult to understand why it is not certain enough as a measure for the collection of the tax imposed."

Nothing in the foregoing excerpt contradicts or qualifies the decision in point 7 of the syllabus, that the tax commissioner can by a regulation supply the failure of the Legislature to adopt a standard pressure. The suggestion that the tax to be collected from the plaintiff in er-

ror could be measured by the amount of gas it purchases and sells, is in no way laid down as a rule binding on the tax commissioner or as interfering with his freedom in establishing rules and regulations.

The plaintiff in error has no difficulty in collecting from its customers because it supplies them under contracts which, unlike the transportation tax act, definitely fix bases of measurement, which bases are in some cases ten ounces and in other cases eight ounces of pressure to the square inch above atmospheric pressure, with an assumed temperature. The tax, however, is not upon the privilege of selling gas, but upon the privilege of transporting natural gas by pipe lines, and this transportation is accomplished by the plaintiff in error and others, under the admitted facts, at pressures varying from less than four ounces to above four hundred pounds to the square inch. The amount of the tax, therefore, may rise or fall from one-third of one cent to four dollars for the same quantity of gas, depending upon what the Tax Commissioner may determine by regulation under the decision of the Supreme Court of Appeals.

If it be argued that the Court has pointed out to the tax commissioner a rule which he may adopt without exercising legislative functions, it is clear that no such rule could make the law equal and uniform as a scheme for taxing the *transportation* of natural gas. Each person firm or corporation could make the rate and amount of taxes dependent on the way the gas was bought or sold and not on the amount transported, as compared with the amount transported by any other person, firm or corporation. And each transporter of gas could by changing the pressure at which the gas was bought or sold reduce the rate and amount of taxes, and thereby be en-

abled to pay a less amount for a greater quantity of gas transported.

As we said before, the privilege tax being based on the amount of gas transported, equality and uniformity demand that the unit of quantity in transportation be defined, and that as applied to natural gas the unit of quantity is not defined and can not be unless a standard pressure is adopted.

Respectfully submitted,

R. G. ALTIZER,

MALCOLM JACKSON,

Attorneys for Plaintiff in Error.

APPENDIX.

An Act to levy a privilege tax on any person, firm or corporation engaged in the transportation of crude oil or petroleum, or the distillates thereof, or of natural gas, by means of pipe lines, authorizing the State Tax Commissioner to provide rules and regulations for the collection of such tax, and defining the duties of the State Tax Commissioner hereunder.

Be it enacted by the Legislature of West Virginia:

Section 1. No person, firm or corporation, hereinafter called company, after the first day of July, one thousand nine hundred and nineteen, shall engage in or continue in the business of the transportation of crude oil or petroleum, or the distillates thereof, or of natural gas, by means of pipe lines, without the payment of an annual privilege tax hereby imposed for engaging in such business; *provided, however,* that nothing contained in this act shall apply to any person, firm or corporation engaged in the business aforesaid where the crude oil, petroleum or distillates thereof, or natural gas, is by the entire system of such person, firm or corporation, transported a distance of less than ten miles.

Sec. 2. Every person, firm and corporation engaged in this state in the transportation of either crude oil or petroleum, or the products and distillates thereof, or of natural gas, or both, by means of pipe lines for sale to consumers within or without the state, or use within or without the state in the making of any products derived

therefrom, shall pay to the state, as an annual privilege tax for engaging in such business in the state, two cents for each barrel of crude oil or petroleum, or the distillates thereof, and one-third of one cent for each thousand cubic feet of such natural gas as is so transported or conveyed within this state. *Provided*, that only one such tax, annually, shall be required to be so paid.

Sec. 3. Every person, firm or corporation liable to tax imposed by this act, shall, within sixty days after the first day of July, one thousand nine hundred and nineteen, and within sixty days after the first day of July in each year thereafter, deliver to the State Tax Commissioner a return in writing showing the quantity of crude oil or petroleum, or the distillates thereof, or of natural gas transported or conveyed within this state during the fiscal year ending on the first day of July next preceding. Such return shall be signed and sworn to by the person making the same for himself or a partnership, and by the president, vice-president or other principal accounting officer making the same for a corporation, which return shall be in the form prescribed by the State Tax Commissioner. The State Tax Commissioner is hereby invested with full power and authority and it is hereby made his duty to prescribe forms for returns and assessments and to make, issue and put in force all necessary and needful rules and regulations for ascertaining and assessing the tax hereby imposed upon every company.

Sec. 4. The State Tax Commissioner shall ascertain and assess the tax upon the company making a return, and shall notify it of the amount of such tax by notice deposited in the post office addressed to such company at its principal office or place of business. Such ascertainment

of the tax shall be final and conclusive, unless the same be appealed from in the manner following within thirty days after such notice is so deposited. If any company fail or refuse to make return, the State Tax Commissioner shall proceed, in such manner as may be proper, to obtain the facts and information required to be furnished by such return; and to this end he may, by himself or his duly appointed agent, make examination of the books, records and papers of any such company, and may take the evidence, on oath, of any person who he may believe shall be in possession of facts or information pertinent to the subject of inquiry, which oath he or the agent so appointed by him may administer. As soon as possible after procuring such information as he may be able to do with respect to any company failing or refusing to make a return, the State Tax Commissioner shall proceed to ascertain and assess the tax upon such company, and shall notify it of the amount thereof as hereinbefore provided. And his act shall be final as to any company which refused to make a return.

Sec. 5. If any such company, making a return as provided by this act, feels aggrieved by the assessment so made upon it for any year by the State Tax Commissioner, it may apply to the Board of Public Works by petition in writing, within thirty days after the notice is deposited as provided in the preceding section, for a hearing and a correction of the amount of the tax so assessed upon it by the State Tax Commissioner, in which petition shall be set forth the reasons why such hearing should be granted and the amount such tax should be reduced. The board shall promptly consider such petition, and may grant such hearing or deny the same. If denied, the pe-

tioner shall be forthwith notified thereof; if granted, the board shall notify the petitioner of the time and place fixed for such hearing. After such hearing the board may make such order in the matter as may appear to them just and lawful, and shall furnish a copy of such order to the petitioner.

Sec. 6. No injunction shall be awarded by any court or judge to restrain the collection of all or any part of the taxes imposed and assessed under this act, except upon the ground that the assessment thereof was in violation of the constitution of the United States, or of this state; or, that the same were fraudulently assessed; or, that there was a mistake made in the amount of taxes assessed; and in case of a mistake no such injunction shall be awarded, unless application shall be first made to the Board of Public Works to correct the alleged mistake, and the board shall refuse to do so, which fact shall be stated in the bill, or unless the complainant pay into the treasury of the state all taxes appearing by the bill of complaint to be owing.

Sec. 7. Every company so assessed with taxes shall pay the same into the state treasury within sixty days after the date of the mailing of the notice of the amount thereof, or within thirty days after notification of the amount thereof, when ascertained and assessed by the Board of Public Works on appeal. All taxes assessed under provisions of this act against any such company shall constitute a debt to the state, and may be collected by action of assumpsit or appropriate judicial proceeding, which remedy shall be in addition to all other existing remedies for the collection of taxes. It shall be the duty of the State Tax Commissioner to proceed to collect such taxes

with a penalty of ten per centum added thereto, if not paid when due. At the time of paying the taxes the State Tax Commissioner shall issue to the company paying the same a certificate of payment for the proper fiscal year.

Sec. 8. Any person required or authorized by law to make, sign or verify any return by this act, who makes any false or fraudulent return or statement with intent to defraud the state or defeat or evade the payment of the tax, or any part thereof, imposed by this act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred dollars, nor more than five thousand dollars, to which fine shall be added the costs of prosecution.

Sec. 9. Any person engaging or continuing in the business aforesaid without having first secured a license, as hereinbefore provided, shall be liable to a fine of not less than one thousand dollars nor more than ten thousand dollars.

Sec. 10. All acts and parts of acts inconsistent herewith are hereby repealed.



OCT 12 1921

WM. R. STANSBURY

CLERK

Supreme Court of the United States

OCTOBER TERM, 1921.

No. **276**

UNITED FUEL GAS COMPANY, *Plaintiff Below,*
Plaintiff in Error,

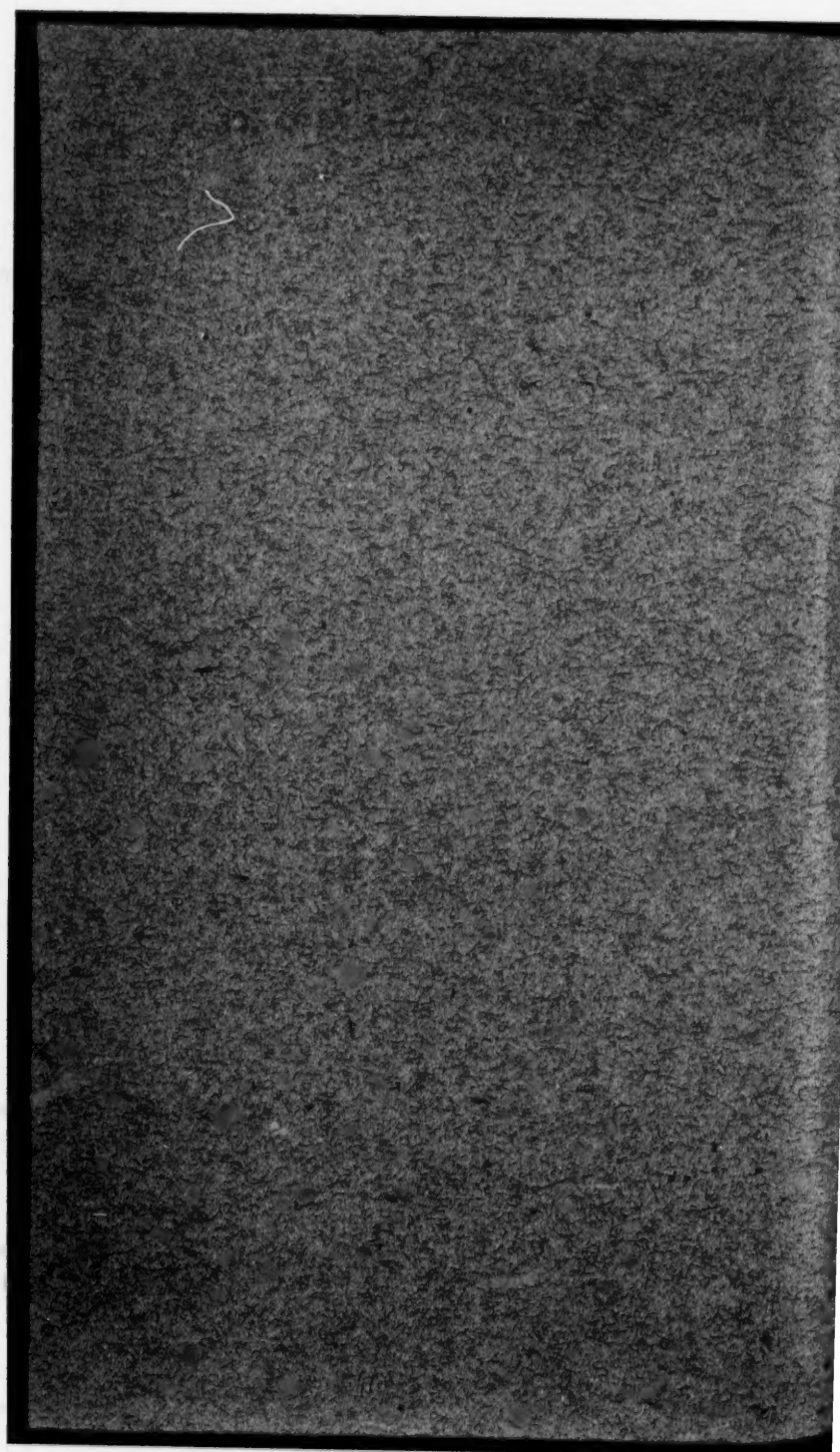
vs.

WALTER S. HALLANAN, State Tax Commissioner of
the State of West Virginia, and E. T. ENGLAND,
Attorney General of the State of West Virginia, *De-*
fendants Below, Defendants in Error.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE
WEST VIRGINIA.

Motion to Dismiss Writ of Error, and Brief Filed on Be-
half of Defendants Below, Defendants in Error.

E. T. ENGLAND,
Attorney General of West Virginia.
S. B. AINS,
F. O. BLUE,
WM. GORDON MATTHEWS,
Attorneys for Defendants in Error.



SUBJECT INDEX OF BRIEF

	Pages
Motion to dismiss writ of error and deny writ of certiorari	1-4
Controverted statement of the record	4-16
Argument	16
Construction of Statute by Supreme Court of Appeals of West Virginia binding on this Court, and correct as an original proposition	16
Allegations in Answer, in absence of replication, are taken as true under West Virginia practice	21
Discussion of plaintiff in error's first point of argument as to any substantial Federal question being presented for review	22-24
Discussion of plaintiff in error's second point of argument that natural gas is a commodity of interstate commerce	24
Discussion of plaintiff in error's third point of argument that interstate carriage does not depend upon connecting agencies	25-26
Discussion of plaintiff in error's fourth point of argument as to character of commerce dependent upon its true and essential character	26-29
Discussion of plaintiff in error's fifth point of argument as to subsequent sale of gas by purchasing companies	30-42
Discussion of plaintiff in error's sixth point of argument that tax on intrastate business does not require the payment of any tax on the right to do interstate business	42-48
Discussion of plaintiff in error's seventh point of argument that tax is so indefinite as to be void because the pressure under which gas is to be measured not specifically prescribed in statute	48-50

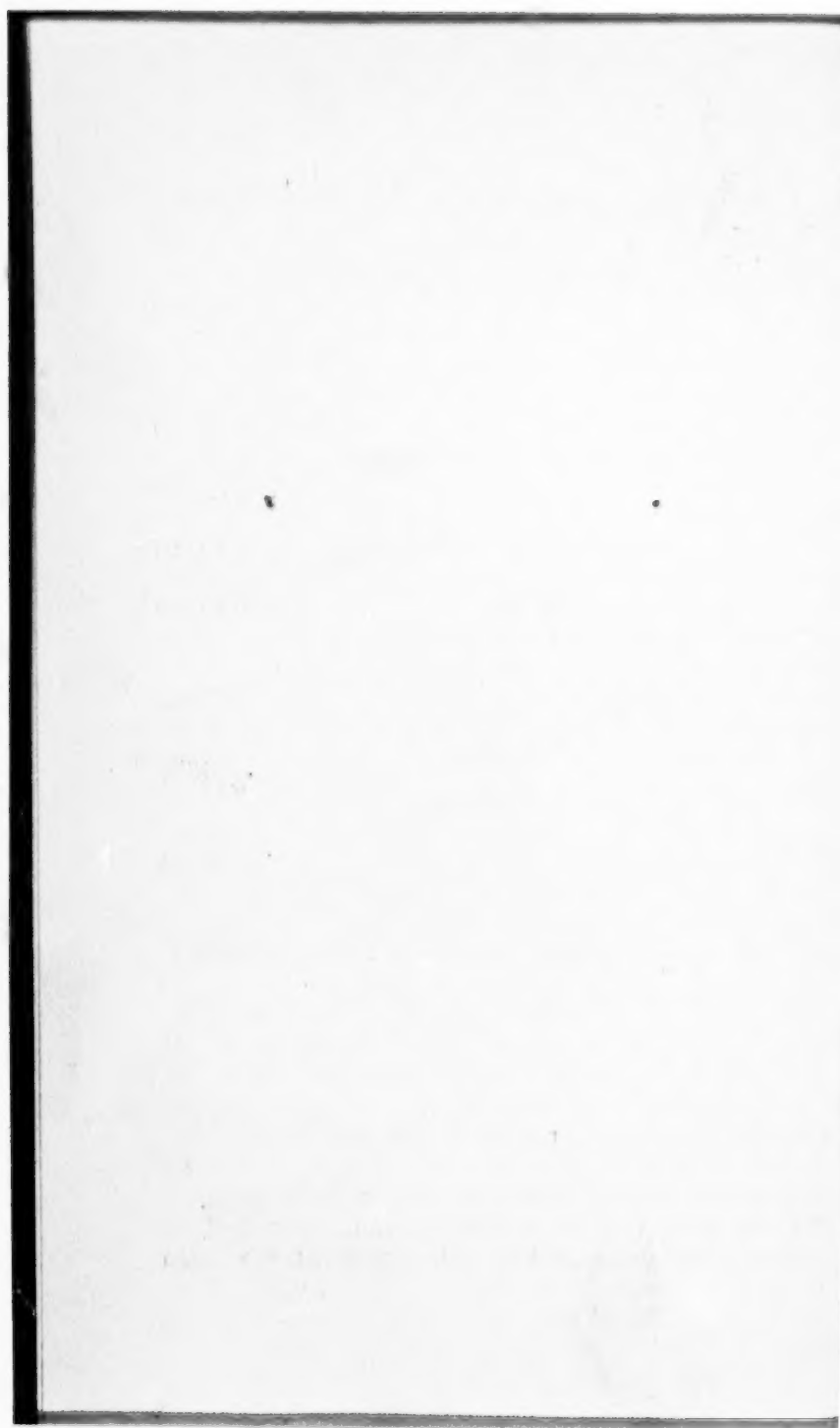
CASES CITED

	Pages of Brief
Allen v. Pullman Palace Car Co., 191 U. S. at p. 181, 48 L. Ed., at p. 139	21, 44, 45
American Mfg. Co. v. St. Louis, 250 U. S. 459, 64 L. ed. 1084	19
Arkadelphia Milling Co. v. St. Louis S. W. R. R. Co. 243 U. S. 36, 61 L. Ed. 578	38
Baltic Mining Co. v. Massachusetts, 231 U. S. 68 82 L. ed. 127	20
Barrett v. New York, 232 U. S. 14, 58 L. ed. 482 ..	17
Bowman v. Continental Oil Co. Adv. Sheets Jul. 15, 1921, p. 70	18, 43
Brown v. Click, 65 W. Va. 459	21
Coe v. Erroll, 116 U. S. 517, 29 L. ed. 715	36, 37
Elmendorf v. Taylor, 10 Wheat. 152	16
Ficklen v. Shelby County, 145 U. S. 1, 36 L. ed. 601	20
Flint v. Stone Tracey Co., 220 U. S. 107, 55 L. ed. 389	19
General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754	37
Gulf, Colo. & Santa Fe Ry. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540	39
Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025	19
Kansas City etc. R. R. Co. v. Botkin, 240 U. S. 227, 61 L. ed. 617	19
Kansas City etc. R. R. Co. v. Stiles, 242 U. S. 111, 61 L. ed. 176	20
Kehrer v. Stewart, 197 U. S. 240, 49 L. ed. 663.....	17
Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311	47
Louisville etc. Ry. Co. v. Mississippi, 133 U. S. 587, 33 L. Ed. 784	17
Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124	19

CASES CITED

iii

Merchants Nat'l Bk. v. City of Richmond, Adv. Sheets July 15, 1921, 717	22
McCoy v. McCoy, 74 W. Va. 64	21
McCluskey v. Marysville & North. Ry. Co., 243 U. S. 36, 61 L. ed. 578	35
Ohio R. R. Comm. v. Worthington, 225 U. S. 201, 56 L. ed. 1004	30
Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586 17, 18, 21, 48, 49	
Peik v. Chicago etc. R. R. Co., 94 U. S. 164, 24 L. ed. 97	17
Pennsylvania Gas Co. v. Public Service Commis- sion, Adv. Sheets Apl. 15, 1920, p. 306	22, 30
Pennsylvania R. R. Co. v. Clark Bros. Min. Co. 238 U. S. 456, 54 L. ed. 1406	26, 27
Platt v. New York, 232 U. S. 58, 58 L. ed. 492	17
Postal Tel. Cable Co. v. City of Freemont, Adv. Sheets Apr. 15, 1921, p. 377	43
Postal Tel. Co. v. Richmond, 249 U. S. 252, 63 L. ed. 59	20, 44
Public Utilities Comm. v. Landon, 249 U. S. 252, 63 L. ed. 577	26, 27, 30
Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877	17, 44
Quong Ham Wah Co. v. Industrial Accident Com- mission, Adv. Sheets Apl. 15, 1921	17
Swift & Co. v. United States, 196 U. S. 398, 49 L. ed. 518	26, 28
Texas v. New Orleans R. R. v. Sabine Tram Co., 227 U. S. 111	41
Underwood Typewriter Co. v. Chamberlain, Adv. Sheets Dec. 15, 1920, p. 50	44, 46
United States Ex. Co. v. Minnesota, 233 U. S. 335, 56 L. ed. 459	20
Western Oil Co. v. Lipscomb, 244 U. S. 346	26, 28
Western Union Tel. Co. v. Foster, 247 U. S. 112	26, 29
Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220	49



Supreme Court of the United States

OCTOBER TERM, 1921.

No. 835.

UNITED FUEL GAS COMPANY, *Plaintiff Below,*
Plaintiff in Error,

vs.

WALTER S. HALLANAN, State Tax Commissioner of
the State of West Virginia, and E. T. ENGLAND,
Attorney General of the State of West Virginia, *De-*
fendants Below, Defendants in Error.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE
WEST VIRGINIA.

Motion to Dismiss Writ of Error, and Brief Filed on Be-
half of Defendants Below, Defendants in Error.

MOTION TO DISMISS WRIT OF ERROR.

The defendants in error move that the writ of error awarded herein be dismissed because the decision of the court below was not of such character as to justify the award of such writ under Section 237 of the Judicial Code as amended by the Act of Congress approved September 6, 1916.

The statute in question here, being Chapter 5 of the Acts of the Legislature of West Virginia, passed at its Extraordinary Session 1919, set out in full as an exhibit with the plaintiff's bill of complaint (R. p. 24 and following), imposes, *inter alia*, upon every person, firm and

corporation engaged in said State in the transportation of natural gas by means of pipe lines for sale to consumers within or without the State, for use within or without the State in the making of any products derived therefrom as an annual privilege tax for engaging in such business in said State one-third of one cent for each thousand cubic feet of such natural gas as is so transported or conveyed within said State. The statute, in terms, does not apply to any person, firm or corporation engaged in such business where natural gas by the entire system of such person, firm or corporation is transported a distance of less than ten miles.

This statute is assailed by the plaintiff in error as imposing a direct and immediate burden upon the interstate commerce in which said plaintiff is engaged, and as violative of the commerce clause of Article I, section 8, of the Constitution of the United States.

The Supreme Court of Appeals of West Virginia construed this statute as imposing a tax only upon those engaged in the transportation of natural gas in *intrastate commerce*, and further construed said statute as authorizing the tax imposed to be measured only by the amount of *such commerce*. The syllabus and opinion of said Supreme Court of Appeals of West Virginia is found in the record at page 72 and following, and in the syllabus, prepared by the said Court (which, under the Constitution of West Virginia, Section 5, Article VIII, it is the duty of the Court to prepare and which state and constitute all of the points actually adjudicated in each case) these points are stated as follows:

“3. A State may not impose a tax upon the privilege of engaging in interstate commerce within its borders.

“4. A State may not impose a tax upon the privilege of engaging in intrastate commerce, and

measure the amount thereof by a certain percentage of all of the business transacted within the State, whether interstate or intrastate.

“5. Chapter 5 of the Acts of the Legislature, Extraordinary Session, 1919, imposing a tax upon the business of engaging in the transportation of oil and gas by pipe lines, properly construed, imposes such tax only on those engaged in the transportation of such commodities in intrastate commerce, measured by the amount of such commerce.”

It is therefore apparent that the court below did not construe said statute so as to permit of its imposing a tax upon interstate commerce, nor even as authorizing the tax imposed upon intrastate commerce to be measured, either in whole or in part, by any interstate commerce whatever. The points of the syllabus quoted so state the law affirmatively, and also state negatively that no such power exists in a State, and that any statute either imposing a tax upon the privilege of engaging in interstate commerce or attempting to measure the amount of a tax on intrastate commerce by a certain percentage of all business transacted within the State, whether interstate or intrastate, is invalid.

We, therefore, submit that this record and the decision of the court below do not present or draw in question the *validity* of a statute of, or an authority exercised under any State, the invalidity of which is claimed on the ground of their being repugnant to the Constitution, treaties or laws of the United States, with the necessary decision in favor of such validity, prescribed by the act of September 6, 1919, such as would justify a re-examination thereof by this Court upon writ of error.

Neither do we think that the decision, so construing said statute, presents a case wherein was drawn in question “any title, right, privilege or immunity” claimed

under the Constitution or any treaty or statute of, or commission or authority exercised under the United States, so as to justify the award of a writ of certiorari, which is also sought by the plaintiff.

We respectfully submit that the record presents nothing except an insistence on the part of the plaintiff of a right to carry on an intrastate business, as properly defined by the court below, without being subject to taxation by the State of West Virginia.

This claim is, in effect, simply that because the commodity in question, natural gas, is a lawful *subject* of interstate commerce and may or may not be subsequently placed therein, that it may neither be subject to a tax, nor made the measure of a tax, *prior* to its being at least definitely determined by its owner that it shall be so placed in such commerce, or actually so started therein.

We, therefore, respectfully insist that *no substantial federal* question is now presented for review, and move that the writ of error be dismissed and the writ of certiorari denied.

CONTROVERTED STATEMENT OF THE RECORD.

This case was submitted upon the plaintiff's bill of complaint and exhibits therewith, the demurrer and answer of the defendants and the exhibits with such answer, and an agreed stipulation of facts signed by counsel for the respective parties and found in the record at page 50 and following. While the stipulation provides that the facts therein set forth shall be given the same full force and effect as if the plaintiff had replied generally to the defendants' answer, yet attention is called to the fact that this provision was simply made as a matter of precaution so as to insure the facts stipulated being considered, and there was no replication, either general or special, to the answer of the defendants.

The failure of the plaintiff to file a replication to such answer was intentional and pursuant to an agreement between counsel, as it was and is the belief of counsel that the averments of the plaintiff's bill are, for the purposes of this suit, correct, except in so far as they are challenged by the specific averments and matters set forth in the answer of the defendants, and that the averments of the defendants' answer are true and correct, except in so far as, if at all, the same are contradicted by or in conflict with some provision or provisions of the agreed statement of facts. It is the settled law of West Virginia that all material averments in an answer to which there is no replication are taken as true, whether such averments are responsive to the bill or not.

No technical objection has been raised at any time as to jurisdiction existing in equity to determine the issues involved, or as to the right of the plaintiff to bring suit against the defendants named, or that other or additional State or County officers should have been named as defendants, or that the suit is against the State of West Virginia, and could not for that reason be maintained.

At the outset and before any consideration of the case we desire to sharply challenge the false postulate upon which rested the principal contention of the plaintiff in the court below, its sole contention in the petition for a writ of error, and, as we understand it, the principal basis of each and all of its assignments of error, except such assignments as are made formally and as matter of careful draftsmanship, and the only "general reason" assigned in its petition for a writ of certiorari. This postulate is that the gas produced or purchased by the United Fuel Gas Company in West Virginia and by it transported and sold and delivered *at points in West Virginia* to Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh and West Virginia

Gas Company was either by contract or implied agreement *at or before* the time of sale and delivery to these companies in West Virginia subject to any sort of obligation or agreement on the part of the United Fuel Gas Company that such gas, or any part thereof, should by the purchasing companies, respectively, after they received it, be continuously transported, without interruption, into States other than West Virginia for sale and use in such States.

We believe that, in the last analysis, all of the contentions of the United Fuel Gas Company in this Court must rest upon this postulate, and we believe that it is demonstrably false, in point of fact, on the record, and can be easily shown to be from the record. We feel it our duty to first attempt to point out this error, before considering the question of the law applicable, even should the plaintiff be correct in this respect.

As heretofore stated, the record consists only of bill, answer and an agreed stipulation of facts, and it is therefore an easy matter upon an examination of these three portions of the record to determine whether or not there is justification for the plaintiff's postulate in this respect.

The plaintiff in its bill, paragraph V, at pages 9 and 10, makes the following averment:

"Of the total quantity, however, above mentioned, of 53,629,791 M. cubic feet, produced by your orator or by other producers and purchased by your orator in the State of West Virginia, approximately 42,000,000 M cubic feet was, during the year ending July 1, 1919, transported across the boundary line of the State of West Virginia into the States of Kentucky, Ohio, and Pennsylvania, in some instances entirely through pipe lines owned and operated by your orator, and in other instances by means of connecting pipe lines of companies to whom your orator sells such natural gas, and in each instance where the gas is

sold by your orator to Ohio Fuel Supply Company, Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, it is by said purchasing companies transported into States adjoining the State of West Virginia, by means of connecting and continuous pipe lines, without interruption of its flow, the same being measured while in transit without stopping or coming to rest for any purpose until it reaches the ultimate consumers and users thereof in the States of Kentucky, Ohio and Pennsylvania. The said gas so transported and sold by your orator to each of the four Companies above mentioned, is so transported and sold under contracts with said Companies, *which in each case contemplated that the principal part of the gas sold was to be transported into States other than that in which it was produced, for sale and use in such other States, and each of said Companies, in the contract which it made with your orator for the purchase of said gas, bound itself to construct, and afterwards did construct, to the terminus of one or another of the main trunk lines hereinbefore mentioned as owned and operated by your orator, a connecting pipe line for the purpose of transporting by continuous pipe line to localities outside of the State of West Virginia, for sale and use in said localities outside the State of West Virginia, the natural gas so sold by your orator to said purchasing companies, respectively, except a comparatively small portion of such gas, which it was contemplated would be sold and has been sold by each of said purchasing Companies along their lines in West Virginia."*

The Supreme Court of Appeals of West Virginia has held that *all the gas* sold and delivered to the Ohio Fuel Supply Company passed the point of delivery in West Virginia at the Ohio River in uninterrupted and continu-

ous passage to other States and was not and no part thereof was delivered in intrastate commerce. It is now only necessary therefore to consider the above averment in so far as it affects the other three companies to which gas produced in West Virginia was sold and delivered in West Virginia, namely, Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, to each of which companies the gas of the plaintiff was transported, sold and delivered wholly within the State of West Virginia.

The Court will observe that the above quoted paragraph of the bill says: "The said gas so transported and sold by your orator to each of the four companies above mentioned is so transported and sold *under contracts with said companies*, which in each case *contemplated* that the principal part of the gas so sold was to be transported into States other than that in which it was produced, for sale and use in such other states," etc.

Again, in Paragraph IX of the plaintiff's bill (R. p. 14), there is found the following averment:

"That the gas sold by your orator to the Ohio Fuel Supply Company, Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, as above referred to, is, in each instance, so supplied by virtue of a contract with such purchasing company, at a fixed price per thousand cubic feet for all of the natural gas so sold to each of said Companies; that all of said contracts were in existence long before the passage of said pretended statute levying said privilege tax upon the transportation of natural gas by pipe line in the State of West Virginia, and each of them covers a period of a number of years yet to come; that in and by each of said contracts with the four Companies above mentioned, it was *contemplated and intended* by the parties thereto, and your orator bound itself, to transport, by means of pipe lines

in the State of West Virginia, large quantities of natural gas for transportation by each of said purchasing Companies to localities in other States, there to be used and consumed, by means of continuous pipe lines from points where such natural gas was produced, and the said gas heretofore delivered and sold by your orator to said four several companies, and which is now being so delivered and sold and will in the future be so delivered and sold, has been, is and will be transported mainly for sale and use at places outside of the State of West Virginia and in other States of the United States, in commerce between such other States and the State of West Virginia."

Thus again the plaintiff averred that the *contract* between itself and the four companies named *contemplated* further transportation by the purchasing companies in interstate commerce.

To the foregoing averments of the plaintiff's bill the defendants interposed the following specified denial in their answer, Paragraph 5, (R., p. 34):

"These defendants are advised and aver that in the cases of sales of gas by the plaintiff to the Ohio Fuel Supply Company, Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, said gas is in each instance sold and delivered by the plaintiff to said (*defendant*) companies, *respectively*, at points within the State of West Virginia, and that thereafter said companies have the right to and do use and sell said gas as its own property, and as a matter of fact, in some cases, do sell and deliver a part of the same to consumers in the State of West Virginia."

"These defendants are advised and aver that there is *nothing contained in the contracts* under which gas is sold by the plaintiff to said named companies which in any way provides or requires said gas to be thereafter transported into States other than West Virginia or sold to consumers in

States other than West Virginia,, *but are advised and aver, that after the sale and delivery as hereinbefore set forth said gas is the property of said companies, respectively, for such use and sale as they may elect and determine, without qualification or restriction."*

We respectfully submit that it would be difficult, if not impossible, for the defendants to have more directly put in issue either any averment or implication in the plaintiff's bill which in substance or effect alleged that the gas produced in West Virginia by the United Fuel Gas Company and by it sold and delivered in West Virginia to the four named purchasing companies was under any sort of contract, express or implied, so sold and delivered for further continuous transportation to other States.

As heretofore stated, there was no replication to the defendants' answer, and it therefore remains only to examine the stipulation of facts to determine whether there is anything therein which shows, or tends to show that the sale and delivery of gas by the plaintiff at points in West Virginia to the purchasing companies was a sale outright and for all purposes at the time and place of delivery, which terminated all interest in and control over such gas by the plaintiff, or whether it was actually then delivered for or in contemplation of continuous transportation to other States.

We think it too plain for discussion that the stipulated facts clearly show that at the time and points of delivery of such gas to purchasing companies in West Virginia not only was such gas not delivered for further continuous transportation in interstate commerce, but that it was not then even *mentally determined* by either the seller or purchaser what *percentage*, if any, of such gas should thereafter be consigned to either form of commerce, and certainly at the very least a mental determina-

tion of some percentage by one or the other must be requisite to place a commodity in interstate commerce. Gas can not place itself in such commerce, or be treated as being in law therein simply because certain percentages of a like commodity formerly sold by the same seller to the same purchaser had been after such former sale placed in interstate commerce. The averment of the stipulation in this respect is found in Paragraph 3, Record 53'4, as follows:

"It is further agreed, with reference to the gas sold and delivered to said four Companies under the contracts aforesaid, that all of the gas delivered at any time to the Ohio Fuel Supply Company under the contract between it and the plaintiff has been and continues to be, by said Ohio Fuel Supply Company transported to points outside of the State of West Virginia, no part thereof being sold by said Ohio Fuel Supply Company in the State of West Virginia or consumed in said last mentioned State; that of the gas sold and delivered by the plaintiff to the Columbia Gas & Electric Company, at least ninety-nine (99) per cent thereof has been, and continues to be, by the latter Company transported outside the State of West Virginia and sold to consumers outside the said State, not more than one (1) per cent of the gas so delivered to it during any year having been sold by said Columbia Gas & Electric Company in the State of West Virginia or consumed in said State of West Virginia; that of the gas sold by the plaintiff to Pittsburgh & West Virginia Gas Company, at least eighty-eight (88) per cent thereof has been and continues to be, by the latter Company, transported outside the State of West Virginia and sold to consumers outside the said State, not more than twelve (12) per cent of the gas so delivered to it during any year having been sold by said Pittsburgh & West Virginia Gas Company in the State of West Virginia or consumed in said State of West Virginia; that of the gas sold by the

plaintiff to Hope Natural Gas Company, at least sixty-seven (67) per cent thereof has been, and continues to be, by the latter Company, transported outside the State of West Virginia and sold to consumers outside the said State, not more than thirty-three (33) per cent of the gas so delivered to it during any year having been sold by said Hope Natural Gas Company in the State of West Virginia or consumed in said State of West Virginia. The foregoing statements and estimates are based upon the assumption that the same proportion of gas purchased from the plaintiff as of gas produced by said last mentioned three Companies, respectively, or purchased by them from others, goes outside the State of West Virginia, but all of said gas so sold by the plaintiff to said Companies, and each of them, is actually by them commingled and mixed with other gas produced or bought by them while in the State of West Virginia, and the gas so sold by each of said Companies is from the mass so commingled in West Virginia. Each of said Companies produces and buys gas from sources other than the plaintiff, and each is a public service utility corporation under the laws of West Virginia."

The Court will observe from the above that not only do the purchasing companies have the *right to sell* any per cent of the gas purchased which they may desire within the State of West Virginia, but that *they have exercised such right*, and by Paragraph 6 of the stipulation it is shown that it is contemplated that the business of the plaintiff will remain in the future of the same general character. The Court will further notice that while a certain per cent of the volume of gas sold each of the purchasing companies is agreed to have been by such companies thereafter sold for further and subsequent sale in interstate commerce, yet that this agreement and estimate are simply based upon the *assumption* that similar

proportions of the gas bought from the plaintiff are sold by the purchasing companies outside of the State as such companies sell outside of the State of the gas produced or purchased by them from others than the plaintiff. And that the percentages, respectively, which are sold outside of the State are simply transported from the commingled mass of gas acquired by the selling companies by producing it themselves, purchasing it from the plaintiff, and purchasing it from other sources. The stipulation is simply made up of estimates of percentages and, of course, could not have been otherwise, as there is no way of identifying physical gas sold by the plaintiff after it is commingled with gas obtained from other sources.

We think it clear from the foregoing that the record shows that the gas sold and delivered by the United Fuel Gas Company to the Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company was not sold under any contract which required or intended, on the part of either the first or second owner of such gas, that any certain proportion or per cent thereof was to be transported to States other than West Virginia. Whether all, or any proportion thereof, during any given period of time should be so transported without the State was at all times and is now a matter to be determined by the purchasing company, and at any given time all of such gas might, in its absolute discretion, be sold and consumed in West Virginia. The mere fact that such purchasing companies bound themselves to construct, and afterwards did construct to the terminus of the United Fuel Gas Company's trunk lines connecting pipe lines for the purpose of transporting such part of such gas as it might see fit to localities outside of the State of West Virginia, thus equipping themselves to place such proportion of their gas as they might afterwards elect in interstate

commerce, we respectively submit, did not and can not amount to the placement of all or any percentage of such gas in interstate commerce *prior* to its receipt by the purchasing companies and the determination by them of what poportion, if any, they might desire from year to year or from time to time to place in such interstate commerce.

In addition to the foregoing controverted feature of the record as stated by plaintiff in error, we desire to call attention to the following minor inaccuracies or omissions in such statement:

(a) It is stated in the brief for plaintiff in error that "two of the purchasing companies, however own all of the capital stock of the plaintiff in error, and in the case of the other two the contracts permitted the plaintiff in error to charge the purchasers with one-half of the amount of the tax imposed by the transportation tax act, provided such tax is lawful" (Brief, page 18.)

The stipulated facts (R., p. 52, Paragraph 3) show that the contract between the United Fuel Gas Company and the Ohio Fuel Supply Company and the Columbia Gas & Electric Company fix a price to be paid for gas to be delivered thereunder, respectively, based upon the cost of producing such gas, and the effect of such provision is to enable the plaintiff to treat any lawful taxes levied upon its property or upon the privilege or franchise of conducting its business as a part of the cost of producing such gas and thereby to have reimbursed to it by such gas and thereby to have reimbursed to it by such purchasing companies *the entire amount of any such lawful tax* insofar as the same is apportionable to the gas sold under such contract."

This passed the whole of the tax in question to the purchasing companies.

Said stipulation further shows that as to the gas sold to the Hope Natural Gas Company and the Pittsburgh & West Virginia Gas Company there is a provision contain-

ed in each contract the substance of which is that in case any lawful tax or assessment should be imposed after the date of said contracts, August 25, 1916, upon natural gas in any manner so as to constitute, in effect, a charge upon gas delivered thereunder the amount paid on account of such tax or assessment should be borne one-half by said purchasing companies, respectively, insofar as such tax affects, relates to or is apportionable to the amount of gas delivered under said contracts, respectively, and in the event the plaintiff should be required to pay the same, then one-half of the amount thereof should be refunded by said companies, respectively, to the plaintiff, in addition to the price to be paid for gas in said contracts set forth.

(b) It is stated in the plaintiff's brief (page 19) that the gas sold by the plaintiff during the year ending July 1, 1919, was sold under contracts, which are in some cases based upon a pressure of eight ounces and in other instances of ten ounces per square inch.

There is nothing in the record to justify this statement, or to show that such gas was sold under different or varying pressures to the square inch.

(c) It is stated in the plaintiff's brief (page 17), referring to gas delivered in West Virginia to other companies, that there was no interruption of the flow of the gas thereafter either at the points of delivery or at any other point within the State.

This statement is erroneous and misleading unless it is intended to be read in connection with the stipulated facts that after such delivery certain percentages of said gas are actually interrupted, sold and entirely consumed within the State of West Virginia.

(d) While not an omission from the record yet the Court will take judicial notice of the statute law of West Virginia, and of the fact that during the pendency of this suit the Legislature of said State, Regular Session 1921,

adopted a new and comprehensive system of taxation known as the "Gross Sales Tax" and being Chapter 110, Acts 1921. This statute repealed, along with a number of other tax statutes, Chapter 5 of the Acts of 1919, Extraordinary Session, the statute involved in this litigation, but with a proviso continuing it in force for the assessment and collection of taxes which have accrued thereunder to June 30, 1931, the repealing section, so far as material, being as follows:

"Sec. 16. Sections * * * * and sections one to nine, both inclusive, of chapter 5 of the Acts of the Legislature of West Virginia, Extraordinary Session of one thousand nine hundred and nineteen, and all other acts and parts of acts inconsistent with the provisions of this act are hereby repealed. *Provided, however,* that said sections shall remain in force for the assessment and collection of all taxes which have accrued thereunder up to and including June thirtieth, one thousand nine hundred and twenty-one and for the imposition and collection of all penalties which have accrued and may accrue in relation to any such taxes up to and including June thirtieth, one thousand nine hundred and twenty-one."

ARGUMENT.

We assume that no question will be raised as to the construction and interpretation of the statute as construed by the decision of the Supreme Court of Appeals of West Virginia, being binding upon this Court, and that such construction is to be taken and accepted by this Court for all purposes as being the statute itself. Such seems to be the unbroken rule of decisions from at least as early as the impressive language used by Chief Justice Marshall in the case of *Elmendorf v. Taylor*, 10 Wheat. 152, to at least as recently as *Quong Ham Wah Co. v. Industrial Accident Commission*, decided March 21, 1921, Adv. Sheets April 15, 1921.

Inasmuch, however, as certain of the plaintiff in error's assignments of error, particularly assignment tenth, would seem to attempt to draw in question the correctness of the construction placed by the Court below upon Chapter 5, Acts 1919, Extraordinary Sessions, insofar as the decision holds that it was the legislative intent to thereby impose a tax only upon the intrastate transportation of the plaintiff and measured by the amount of such commerce, then we submit that the correctness of the Court's decision in so construing and limiting such statute is plainly correct under the decisions cited by the Court in its opinion, found in the record on pages 77-8-9, and under the following cases, which are only a few selected from many;

Quong Ham Wah Co. v. Industrial Accident Commission, Adv. Sheets April 15, 1921.

Kehrer v. Stewart, 197 U. S. 60, 49 L. Ed. 663.

Pullman Company v. Adams, 189 U. S. 420, 47 L. Ed. 877.

Platt v. New York, 232 U. S. 58, 58 L. Ed. 492.

Barrett v. New York, 232 U. S. 14, 58 L. Ed. 482.

Louisville, etc. Ry. Co. v. Mississippi, 133 U. S. 587, 33 L. Ed. 784.

Peik v. Chicago etc. R. R. Co., 94 U. S. 164, 24 L. Ed. 97.

Osborne v. Florida, 164 U. S. 650, 41 L. Ed. 586.

It was at no time contended by counsel for the defendants in this case that the statute involved required the payment of the privilege tax to enable the plaintiff to carry on its interstate business. It has been and is now conceded that it may carry on all business which constitutes interstate commerce without the payment of any tax as

fully and freely in all respects as if this statute had never been enacted. It was contended in the Court below that as a condition of carrying on intrastate business the plaintiff must pay a license tax, and that in the ascertainment and computation of the amount of such tax interstate business as well as intrastate business should be considered. But this contention of the defendants was decided squarely against them by the court below. That court, as clearly appears from its opinion, held that the statute did not contemplate or permit the consideration, even as a partial *measure* of the tax of any interstate business, and further, that if it had so attempted to require such interstate business to be considered for such purpose, it would have been invalid.

There is, therefore, eliminated from this case, so far as the interstate commerce clause of the Federal Constitution is concerned, every vestige of a Federal question except the question whether or not a certain part of the business of the plaintiff herein, to-wit, the sale and delivery by it of gas produced and transported in West Virginia to points in West Virginia to the three purchasing companies, namely, Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh & West Virginia Gas Company, is intrastate or interstate.

The total amount of the gas delivered to these three companies for the year ending June 30th, 1919, aggregated nearly twenty-three billion cubic feet, namely, 22,799,115 M. cubic feet.

During the same period it sold and delivered to consumers in West Virginia more than eleven and one-half billion cubic feet, namely, 11,990,565 M cubic feet.

It can certainly not be questioned that the State has full power to impose a privilege tax upon the right of a corporation to carry on an intrastate business simply because such corporation also carries on, through the same instrumentalities, an interstate business.

Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586.

Bowman v. Continental Oil Co., Adv. Sheets July 15, 1921, p. 70.

The court below having expressly limited the tax to the right to carry on such an intrastate business, and having limited the *measurement* of such tax by the amount of such intrastate business, excluding even from the measurement of such tax all interstate business as defined in the opinion, it is unnecessary for the defendants in error to seek to bring such decision within that class of cases which hold that an excise tax imposed generally upon the privilege of doing a business is ordinarily severable when its application to interstate business would render it invalid, as in the case of *Bowman v. Continental Oil Co.*, *supra*. Nor is it necessary to attempt to bring it within the long line of cases which hold that where the right of taxation upon the privilege is lawfully exercised under the sovereign authority of a State that the measure of such tax is arrived at by the consideration of income produced in part from property which is itself non-taxable, or income derived in part from interstate business, does not invalidate such tax. Of this last class of cases, sustaining such taxation, the following are but a few:

Flint v. Stone Tracy Co., 220 U. S. 107, 55 L. Ed. 389.

Kansas City etc. R. R. Co. v. Botkin, 240 U. S. 227, 61 L. ed. 617.

American Mfg. Co. v. St. Louis, 250 U. S. 459, 63 L. ed. 1084.

Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124.

Home Ins. Co. v. New York, 134 U. S. 594, 23 L. ed. 1025.

Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 82 L. ed. 127.

United States Express Co. v. Minnesota, 233 U. S. 335, 56 L. ed. 459.

Kansas City etc. R. R. Co. v. Stiles, 242 U. S. 111, 61 L. ed. 176.

Postal Telegraph Co. v. Richmond, 249 U. S. 252, 63 L. ed. 59.

Ficklen v. Shelby County, 145 U. S. 1, 36 L. ed. 601.

These cases were urged upon the Supreme Court of Appeals of West Virginia as sustaining the *measure* of the tax contended for by the State, which *measure* would have included the gas transported in interstate commerce. But, as will appear from the opinion below, that court construed the language of the statute and the power of the State with the utmost strictness limiting both to purely intrastate business. To this construction the defendants in error felt constrained to bow, and it is submitted that of such construction the plaintiff in error has no just cause of complaint and that its complaint, based thereon, presents no substantial Federal question.

Under the undisputed averment of the answer, Paragraph 3, plaintiff since its incorporation has "carried on and is now carrying on a most extensive business within the State of West Virginia and producing, transporting, distributing and selling natural gas all within said State, and that in such business, and in all of its branches, said plaintiff enjoys and has a virtual and practical monopoly throughout the Southern portion of West Virginia, and in such section sells and supplies gas to many cities and towns, and to all classes of consumers, industrial and manufacturing, as well as domestic consumers of said gas, and that said business, conducted in its various

branches wholly within the State of West Virginia, amounts to many millions of dollars per annum."

The extent and the limitations of the monopoly enjoyed by the plaintiff in the Southern portion of West Virginia, as alleged in the answer, are set forth and defined in the stipulation found in the record on pages 50, 51 and 52.

The averments of the answer (R., p. 33) show that the purely and admittedly intrastate business of the United Fuel Gas Company in West Virginia "amounts to many millions of dollars per annum." Under the settled West Virginia practice, there being no replication to this answer, all of its allegations are taken for true for all purposes in the suit.

McCoy v. McCoy, 74 W. Va. 64.

Brown v. Click, 65 W. Va. 459.

Earlier cases collected *Enc. Dig. Va. and W. Va.* Vol. 1, p. 404.

Therefore it is not necessary to consider those cases which sustain such a tax even where the intrastate business is relatively insignificant, and carried on only as incidental to the interstate business, such as

Osborne v. Florida, 164 U. S. 650, at page 655, 41 L. ed. at page 588.

Allen v. Pullman Palace Car Co., 191 U. S. at p. 181, 48 L. ed. at page 139.

This case differs from *Eureka Pipe Line Co. v. Hallanan*, with which it is heard, in that no question is here involved as to rates, whether prescribed by the Interstate Commerce Commission or the West Virginia Public Service Commission. Not only was no rate prescribed by either, but there was no initial shipment, or any question of carriage involved. Of course the Interstate

Commerce Act expressly withholds the subject of gas transportation by pipe lines from the former, and in the absence of Federal legislation the States are free to regulate rates of such companies.

Compiled States Sec. 8563.

Penn. Gas Co. v. Public Service Comm., Adv.

Sheets Apl. 15, 1920, p. 306.

While in our view the record before the Court presents but a single narrow question for its consideration, in the event that the Court has jurisdiction either upon writ of error or certiorari, namely, the question as to whether or not such portion of the plaintiff's business for the year ending June 30th, 1919 as consisted in sales and

delivery within West Virginia of gas to the Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh and West Virginia Gas Company constituted interstate commerce, yet in view of the fact that perhaps the Court's convenience may best be served, in view of the headings of the plaintiff's brief, by our consideration of the propositions advanced in the same order we will take them up in such order.

PLAINTIFF IN ERROR'S FIRST POINT OF ARGUMENT.

"This suit was brought to challenge the validity of the State statute upon the ground of its repugnance to the Federal Constitution, and the decision of the highest State court being in favor of the validity of said statute the final decree is reviewable in this Court upon writ of error."

For the above proposition no authority is cited except the Judicial Code, Sec. 237, and the case of *Merchants National Bank v. City of Richmond*, Adv. Sheets July 15, 1921, page 717.

In the case cited an ordinance of the City of Richmond, enacted under proper legislative authority, authorized the imposition for the year 1915 upon bank stocks, state and national, of a tax for State purposes of 35 cents, and a tax for city purposes at the rate of \$1.40—a total of \$1.75—upon the \$100.00 valuation, while upon intangible personal property in general, including bonds, notes and other evidence of indebtedness the State rate was 65 cents and the city rate 30 cents—an aggregate of 95 cents—upon each \$100.00 of valuation. Under such statute and ordinance a tax was levied of \$1.40 upon the \$100.00 of ascertained value of each share of stock, while taxes at a much lower rate, 95 cents per \$100.00, were imposed for the same year upon bonds, notes and other evidence of indebtedness.

A proceeding was instituted in the Hustings Court of Richmond to correct such levy and assessment upon the ground that the statute, ordinance and tax were violative of section 5219 of the Revised Statutes of the United States, in that the tax of \$1.40 on the \$100.00 on shares of bank stocks is a higher rate than is assessed upon other "monied capital in the hands of individual citizens of the State." The Court of Appeals of Virginia having sustained the validity of the tax, and hence necessarily of the ordinance and statute, (124 Va. 522, 98 S. E. 643), the case was remanded to the Hustings Court and a judgment entered in conformity with such decision. A writ of error to the judgment of the Hustings Court being refused by the Court of Appeals of Virginia the case was brought to this Court upon writ of error, and this Court held it to be the appropriate process for review.

It seems clear that the final judgment of the Court of Appeals of Virginia in that case did fully and necessarily sustain in its entirety the validity of the ordinance and statute which was clearly there drawn in question, and its decision was no wise a question of mere application

or construction of such ordinance and statute as applied to the plaintiff's business.

In the case at bar, however, it will be noted that while the validity of Chapter 5, Acts 1919 of the West Virginia Legislature is challenged by plaintiff's bill, such challenge is based upon the ground and reason that said statute, in terms, applied to interstate commerce. The decision of the West Virginia Supreme Court of Appeals is that such statute does not so apply, that it was not the legislative intent that it should so apply, and that if it had done so it would be invalid. Therefore, the *validity* of said statute as construed and complained of in the plaintiff's bill was not sustained, but, on the contrary, the gravamen of its complaint was fully sustained by the Court below, but that court held, in substance, that its complaint was imaginary, rather than real. The statute as construed and sustained bears no relation and but little resemblance to the statute as construed and complained of by the plaintiff. Technically, the validity of the statute was sustained, but practically it is a different statute from that of which the plaintiff complained. As construed, it has no relation to interstate commerce, whether as a subject of taxation or as the measure of a tax, and we, therefore, believe and submit that no Federal question as to the validity of such statute was drawn in question in the court below, within the meaning or intent of Section 237, Judicial Code, and, further, that if the validity of such statute was originally drawn in question the decision of the lower court obviated any Federal question as to its validity which should properly be passed upon by this Court upon writ of error.

PLAINTIFF IN ERROR'S SECOND POINT OF ARGUMENT.

"Natural gas is an article of commerce, and its transportation from one State to another for sale,

or in compliance with a contract for its sale and delivery, is interstate commerce."

The defendants in error have never controverted, and do not now controvert, that natural gas is a commodity which may be placed in and become subject to the laws applicable to interstate commerce.

PLAINTIFF IN ERROR'S THIRD POINT OF ARGUMENT.

"The transportation of commercial articles from one State to another, for sale, is none the less interstate commerce merely because accomplished by two or more connecting carriers or agencies, one or more of which operates within the limits of a single State."

The defendants in error have never controverted, and do not now controvert, the correctness of the above proposition in the exact language in which it is stated. They admit and have always admitted that any commodity properly started upon an interstate journey and consigned and intended by its owner to continue thereon to another State for delivery by such owner in such other State is interstate commerce. They believe and insist, however, that until such commodity is actually started upon its interstate journey by the owner or some person having authority to consign it on such interstate journey it remains either in intrastate commerce, or, more properly speaking, not in commerce of any kind, but merely a commodity in custody of the owner and subject to such future disposition thereof as he may elect or determine. They believe further that consignment in pure intrastate commerce to a purchaser in the same State does not become interstate commerce unless and until some act is done or some definite intention arrived at by the person who at a given time has ownership or lawful control thereover to

place the same in interstate commerce. They do not, of course, concede that the character of such commerce if otherwise concededly intrastate, is mechanically and automatically changed into interstate commerce because certain varying or then unknown percentages, which had been formerly sold under similar conditions, had been theretofore by the new purchaser placed in interstate commerce.

PLAINTIFF IN ERROR'S FOURTH POINT OF ARGUMENT.

"In determining whether commerce is interstate or intrastate, regard must be had to its essential character—mere billing or the place at which title passes is not determinative."

For this proposition plaintiff cites five cases, namely, *Public Utilities Commission v. Landon*, 249 U. S. 236, *Pennsylvania R. R. Co. v. Clove Bros.*, 238 U. S. 466, *Swift v. United States*, 196 U. S. 398, *Western Oil Co. v. Lipscomb*, 244 U. S. 346, and *Western Union Telegraph Co. v. Foster* 247 U. S. 112.

In the case at bar the sole question now under consideration is whether the purchasing companies from the plaintiff, to-wit, Columbia Gas & Electric Company, Hope Natural Gas Company, and Pittsburgh & West Virginia Gas Company, having received the gas in West Virginia and thereafter electing to transport the major portion thereof into other States constitutes not the transportation by it into other States as interstate commerce, but *whether it relates back and transforms transportation, sale and delivery to it in West Virginia by a former owner into interstate commerce.*

An examination of the cases cited would seem to shed little, if any, light upon this question now before this Court.

In the case of *Public Utilities Commission v. Landon*, *supra*, this Court simply held that the sale and delivery of gas to customers at burner tips by local distributing companies operating under special franchises, and the payment of two-thirds of the receipts to the natural gas company furnishing the gas through interstate pipe lines, did not constitute any part of interstate commerce so as to exclude State regulation of local rates as being either confiscatory or unduly burdening such commerce.

In that case the Kansas Natural Gas Company produced most of its gas in Oklahoma, and transported it through pipe lines into Kansas and Missouri, in which states, under separate agreements, it sold and delivered it to local companies for ultimate sales to their consumers. Such local companies were held to be subject to State regulation, and the fact that prior to such sales by such local companies the gas had been brought to them in interstate commerce, was held in no manner to affect the character of their business as being purely local and subject to such regulations. If this case has a bearing, it would seem to tend strongly to sustain the contention of the defendants in error here, as it holds that the character of the different companies' business depended upon whether such companies handled the gas in intrastate or interstate commerce, and not at all upon how the gas had formerly been transported.

In *Pennsylvania Railroad Company v. Clark Bros. Mining Co.*, 238 U. S. 456 (cited as *Penn R. R. Co. v. Clove Bros.*, 238 U. S. 466), Clark Bros. Coal Mining Company sold its coal f. o. b. at the mines in Pennsylvania, at which point it was loaded on cars to be transported to points of destination not only in Pennsylvania, but in other States. Transportation to other States absolutely depended upon a proper supply of cars and this Court held that the Interstate Commerce Commission had jurisdiction to require a non-discriminatory distri-

bution of such cars. This Court held that mere billing or the place at which title passed was not determinative of the actual character of the transportation, and that "if the actual movement is interstate" the power of Congress extended to it and that the provisions of the Act to regulate commerce, enacted for the purpose of preventing unjust discrimination by interstate carriers whether in rates or facilities, applied.

In *Swift & Company v. United States*, *Supra*, this Court simply decided, so far as any question of interstate commerce is concerned, that trading in fresh meat was sufficiently shown to be commerce among the States, protected from restraint by the Act of July 2, 1890, by allegations in a bill filed by the United States which charged certain meat dealers with violations of that Act which, even if such allegations imported a technical passing of the title at slaughtering places in cases of sales also imported that the *sales themselves were to persons in other States*, and that the shipments to other States are *pursuant to such sales*, and by allegations charging sales of such meat by their agents in other States, which indicate that some of such sales were made in the original packages.

In *Western Oil Refining Co. v. Lipscomb*, *supra*, the plaintiff company, an Indiana corporation, shipped from its refinery in Illinois into the State of Tennessee exactly the proper quantity of oil and the number of barrels necessary to fill orders previously taken in Tennessee by its traveling salesmen. This Court held that the fact that the cars were first billed to one town in Tennessee, where orders had been taken and which were filled and was then rebilled to cars in another town, where such orders had been taken and were filled, was an interstate transaction and that such business could not be subjected to the payment of the privilege tax by the State of Tennessee,

holding that the rebilling on route did not of itself break the continuity of the movement or require that any part be classified differently from the remainder.

In *Western Union Telegraph Co. v. Foster, supra*, this Court held that the transmission by the Telegraph Company of stock quotations from its New York Exchange to its Boston offices, and subsequently transmitted therefrom to tickers in the office of Massachusetts brokers who had subscribed for such service and been approved by the Exchange, conformably to a contract between the Telegraph Companies, retained its character as interstate commerce until completed in the brokers' offices in Massachusetts.

An examination of these cases, cited by the plaintiff in error, we submit, with the exception of *Public Utilities Commission v. Landon*, show that they have no bearing on the question here involved, and the Landon case is applicable only insofar as it holds that the character of the gas transportation and sale business, when conducted by more than one company, depends upon its character by each Company, and that it may be purely interstate as to the transportation company and purely intrastate as to the selling company, or *vice versa*.

In each of the other cases the transportation was held, under the facts, to be interstate because of the direction, control and shipments of the commodity at the given instant in question by the then owner or person in control. None of these cases, as we read them, involve to any extent the question as to mere knowledge on the part of a present owner of a commodity as to what disposition a subsequent owner would probably make thereof, as being in any way determinative of the character of the first owner's business.

PLAINTIFF IN ERROR'S FIFTH POINT OF ARGUMENT.

"The transportation and sale of natural gas by plaintiff in error to three other companies, chiefly for further transportation by the purchasers to points outside of the State of West Virginia, under contracts contemplating such interstate transportation, in the course of a regularly established business, were transactions in interstate commerce, to the extent that said gas was intended to be and actually was transported outside the State, notwithstanding said gas was delivered by plaintiff in error to the purchaser in the State of West Virginia, and notwithstanding a comparatively small portion of the entire quantity so delivered was resold by the purchasers to the consumers along their lines in West Virginia."

This point of argument is really an elaboration of the fourth point, and the plaintiff in error cites in its support the two cases of *Public Utilities Commission v. Landon*, *supra*, *Pennsylvania Gas Co. v. Public Service Commission*, *supra*, (meaning, we assume, that case as reported in *Adv. Sheets*, Ap'l 15, 1920, p. 306) and the additional case of *Ohio R. R. Commission v. Worthington*, 225 U. S. 201.

No further consideration is necessary of the two first cited cases. The case of *Ohio R. R. Commission v. Worthington*, decided, in addition to the question of this Court's jurisdiction, but a single question, namely, whether the Railroad Commission of Ohio had jurisdiction to fix a rate covering shipments of "Lake Cargo coal," that is coal intended for shipment by lake to points outside of the State of Ohio from the district in which such coal was mined to Huron and Cleveland, Ohio. The jurisdiction of such Commission to fix such rate was denied by this Court upon the ground that on the facts as found by the Circuit Court and afterwards by the Circuit Court

of Appeals and this Court, the shipments covered by such rate were plainly interstate shipments. This was the only question before or considered by this Court, and an examination of the facts so found make it clear beyond question that the rate there involved plainly included, in addition to rail transportation to Huron and Cleveland, the service of unloading the coal from the cars in the vessels and trimming it in the holds of vessels for continuous transportation for points beyond the State of Ohio. The rate purported to apply to such Lake Cargo coal, including loading on vessels and trimming it in the holds of such vessels only, and in case any of such coal was diverted *en route* and devoted to some other purpose, as, for instance, commercial use at Huron, there was another and different intrastate rate prescribed by the Ohio Commission, which was not involved or considered in the case.

This was the only coal, the only shipments and the only rate in any way involved in this case, although it was stated that it might be that after being so loaded and trimmed on vessels a quantity of the coal, so small as to be negligible, was unloaded on one of the Ohio Islands in Lake Erie, but no substantial importance was claimed by any of the litigants from this circumstance, nor could it have been given to it. The question involved was purely one of fact and this Court, after approving the finding of facts made by the Circuit Court and Circuit Court of Appeals, said:

"It is true that the shipper transports the coal ordinarily upon bills of lading to himself, or to another for himself at Huron on Lake Erie. The so-called "Lake Cargo coal" is necessarily shipped beyond Huron. If it stops there, another and higher rate applies. Practically all of it is put on vessels for carriage beyond the State, usually to upper lake ports, *and then, and only then*, the

seventy cent rate fixed by the Commission applies. *This seventy cent rate covers the transportation of the coal to Huron, the placing of it on board vessels, and if necessary trimming it for the continuance of its interstate journey.* It is true, as argued by the learned counsel for the Commission, that this coal may be accumulated in large quantities at Huron and only taken out of the accumulated lots from time to time when it is to be put upon vessels and shipped out of the State, but it must always be remembered that this seventy cent rate applies *solely* to such coal as is in fact placed upon vessels for carriage to beyond the State points; and as the Circuit Court said, the substance of things is not changed by the fact that a small part may be unloaded at one of the Ohio islands in Lake Erie. The situation then comes to this; that the rate put in force is applicable only to coal which is to be carried from the mine in Ohio to the lake, there placed upon vessels, and thence carried to upper lake ports beyond the State. By every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, intended by the parties to be such, and the rate fixed by the Commission which is in controversy here, is applicable *alone* to coal which is thus, from the beginning to the end of its transportation in interstate carriage and such rate is intended to and does cover an integral part of that carriage, the transportation from the mine to the Lake Erie port, the placing upon the vessel and the trimming or distributing in the hold, if required, so that the vessel may complete such interstate carriage."

That case emphasizes the distinction upon which we rely, namely, that it is the character of the business of the carrier or the vendor at a given time which determines the character of the commerce as being intrastate or interstate at such given time. In the Ohio case a

single rate was charged, and the carrier was obligated therefor to transport the commodity in question from one point in the State of Ohio to another and then load upon vessels, trim the coal in the hold, and in all respects place the commodity in shape for continued and continuous interstate carriage. All of these services were rendered by the Railroad Company, and its rate specifically covered them. We see no analogy between such a situation and the case at bar, where the United Fuel Gas Company simply sells and delivers to customers in West Virginia certain quantities of a commodity at certain prices, to be thereafter placed in either intrastate or interstate commerce by such purchasers entirely as they may elect, large percentages thereof being, as matter of fact, heretofore and at the present time, placed in intrastate commerce, and such purchasers having the full right, and exercising it, to vary in their absolute discretion the percentage, if any, which should be sold in interstate commerce, and the United Fuel Gas Company having nothing whatever to do with the subsequent transportation of the gas which it sells as to its being placed in either class of commerce.

In the case at bar the gas sold the three purchasing companies was sold them "for such use and sale as they may elect and determine, without qualification or restriction." At the time of delivery to such purchasing companies it had no fixed destination other than such point of delivery. There were no consignees, either in or out of the State of West Virginia, other than the purchasing companies. Its future destination depended entirely upon the exigencies from time to time of the purchasing companies' respective businesses and the needs of its consumers. Of necessity such exigencies and needs would vary from time to time, from month to month and from day to day, unless such purchasing companies had

outstanding contracts calling for the delivery of all of its gas all the time, which, of course, was not and is not the case. The utmost which can be fairly contended is that the United Fuel Gas Company knew that the purchasing companies had equipped themselves with means of delivering a portion of such gas to customers outside the State of West Virginia, and that an unknown portion of such gas has in the past, and probably would in the future, be transported to such customers. Not necessarily the identical gas sold and delivered by the United Fuel Gas Company, but an uncertain quantity of gas from the commingled mass of gas produced or purchased from such companies from various sources. As to the quantity or percentage of such deliveries beyond the State the United Fuel Gas Company from time to time had and has no control, interest or knowledge, and had and has no duty whatever with such further transportation or disposition. Its situation is differentiated entirely from any of those involved in mere rate cases, in that as to the three purchasing companies in question its relation is primarily that of a vendor, and not of a carrier. The compensation which it receives for gas sold is the purchase price of the commodity itself, not compensation for its carriage. Except for the magnitude of its business it much more nearly resembles that of a farmer hauling farm products for sale to a city, whose interest therein absolutely ceases upon sale and payment, and who is not interested in the slightest, either actually or legally, in how much thereof may be subsequently sold locally or shipped and sold outside the State. The United Fuel Gas Company carries its own commodity by means of its own pipe line from a point in West Virginia to a point in West Virginia and there sells and delivers the same to a purchaser. Its interest in the entire transaction begins and ends when it sells its gas and receives payment therefor.

A case in point is the recent case of *McCluskey v. Marysville & Northern Ry. Co.*, 243 U. S. 36, 61 L. Ed. 578. In that case this Court held that carriage by a mill company of its logs over its own railroad and in its own cars from its own timber land within the State to a tidewater point, also within the State, where such logs were then dumped into the water and sold, some of them going to points outside the State, was not engaged in interstate commerce. In the opinion in that case the Court cites most of the cases relied upon by the plaintiff in error, and quotes, with approval, and adopts the language of the Circuit Court of Appeals for the Ninth Circuit in the same case, which draws the exact distinction and lays down the exact principle upon which we rely in the case at bar, namely, that the character of the transactions of the plaintiff in error is to be determined by its own part therein, and not upon subsequent disposition made of the commodity sold by the purchaser. This Court adopts, with its approval, the language of the Circuit Court of Appeals as follows:

“In the case at bar there was no initial shipment of the goods. The transportation of the poles from the forest in which they were cut to tidewater, where they were sold, was not a shipment. There was no contract of carriage, there was no bill of lading; there was no consignor or consignee. The goods were not transmitted to a carrier. The defendant mill company simply carried over its own road, on its own cars, its own goods to a market where it sold and delivered them. It has no concern with the subsequent disposition of them. It was under no obligation to deliver them to another carrier, and no other carrier was under obligation to receive them or to carry them further. The selling of the poles after the first sale by the mill company, or whether any were going outside the State, depended upon chance or the exigencies of trade.

The movement of the poles did not become interstate commerce until, by the act of the purchaser thereof, the poles were started on their way to their destination in another state or country. The beginning of the transit which constitutes interstate commerce 'is defined in *Coe v. Errol* to be the point of time that an article is committed to a carrier for transportation to the State of its destination, or started on its ultimate passage' ". Citing *General Oil Co. v. Crain*, 209 U. S. 211, 229; 52 L. ed. 754, 764.

Except for the fact that the United Fuel Gas Company knew that the purchasing companies had customers for gas outside of the State of West Virginia, and were equipped to transport gas to them by pipe lines, and except for the difference in the commodities sold, we think this language exactly applicable to the case at bar. Here the United Fuel Gas Company made no contract of carriage, either intrastate or interstate; there was no bill of lading; the commodity was not transmitted to a carrier; the Company simply carried over its own pipe lines, its own goods to a market where it sold and delivered. No contract of carriage being involved at all, its relation in the transaction is simply that of a vendor, and so far as it is considered as a vendor, as distinguished from the subsequent disposition made by the purchaser of the gas, it must be conceded that its sale was intrastate.

In discussing when a commodity is committed to interstate commerce, Mr. Justice Bradley in the case of *Coe v. Erroll*, 116 U. S. 517, 29 L. ed. 715, asks:

"Do the owner's state of mind in relation to the goods, that is his intent to export them, and his partial preparation to do so, exempt them from taxation?"

Further in the opinion Mr. Justice Bradley quotes from the case of *The Daniel Ball*, 10 Wall. 565, "When-

ever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced," but limits and explains such quotation by saying:

"But this movement does not begin until the articles have been shipped or started for transportation from one State to another. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is another part of that journey. That is all preliminary work performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State its destination is not fixed and certain. It may be sold or otherwise disposed of within the State and never put in course of transportation out of the State. Carrying from the farm or the forest to the depot is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting into a course of exportation; it is no part of the exportation itself until shipped or started on its *final journey out of the State*. Its exportation is a matter altogether *in fieri* and not at all a fixed and certain thing."

In *General Oil Company v. Crain*, 209 U. S. 211, Mr. Justice McKenna, in delivering the opinion of the Court, said:

"The beginning and ending of the transit which constitutes interstate commerce are easy to mark. The first is defined in *Coe v. Erroll*, 116 U. S. 517, 29 L. Ed. 715, to be the point of time that an article is committed to a carrier for transportation to the State of its destination, or started on its ultimate passage. The latter is defined to be, in *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257, the

point of time at which it arrives at its destination."

As we have pointed out, the United Fuel Gas Company, the owner of the gas, at no time made any contract of carriage or itself delivered the gas to a carrier for carriage. On the contrary it delivered the gas sold in West Virginia, to the purchaser thereof in West Virginia, for sale and disposition, without the slightest interest, legal or moral, in what that disposition might be.

The case of *Arkadelphia Milling Co. v. St. Louis S. W. R. Co.*, 249 U. S. 134, 63 L. Ed. 517, is also, in one aspect, directly in point in that that case involved the question whether movements of rough lumber from the forest to the mill points in the State of Arkansas followed by the forwarding of the finished products to points outside the State, constituted interstate commerce so as to render inapplicable the rough material intrastate freight rates prescribed by State authority where experience indicated that ninety-five per cent of the product must and would be marketed outside the State. This Court held that the original movement of rough lumber from forest to the mills, as part of the course of business contemplated and carried out, did not itself constitute interstate commerce. It is true that in the case of *Arkadelphia Milling Company v. St. Louis etc. Railway* there was also an obvious distinction from the case at bar, as that case involved the manufacture of the lumber into finished product, and re-shipment thereafter., But it also involved directly the question as to whether the *intention* of the owners, and the course of former business as to the product being intended for ultimate interstate commerce, related back to and controlled the initial movement, and in this connection Mr. Justice Pitney, speaking for the Court, said:

"Where it would eventually be sold no one knew. And the fact that previous experience indicated that ninety-five per cent of it must be marketed outside of the State so that this entered into the purpose of the parties when shipping the rough-material to the mill, did not alter the character of the latter movement. The question is too well settled by previous decisions to require discussion. *Coe v. Erroll*, 116 U. S. 517; *Bacon v. Illinois*, 277 U. S. 504; *McCluskey v. Marysville & N. R. Co.*, 243 U. S. 36. The distinction between these cases and those cited to sustain the decision of the District Court (*Swift & Co. v. United States*, 196 U. S. 375; *R. R. Commission v. Worthington*, 225 U. S. 101; *Texas & Nor. Co. v. Sabine Tram Co.*, 227 U. S. 111; *R. R. Commission v. Texas & Pr. Co.*, 224 U. S. 336) is so evident that particular analysis may be dispensed with."

We understand the distinction referred to by Mr. Justice Pitney to be, in substance, the same as that insisted upon by the defendants in error in this case, namely, that the commodity must have been actually started upon its interstate journey by some person having lawful control and authority to so dispose of it and place it in interstate commerce.

In the case of *Gulf, Colorado & Santa Fe Railway Co. v. Texas*, 204 U. S. 403, 51 L. Ed. 540, this Court again had occasion to consider the effect of the intention and purpose of the purchaser of a commodity as to reshipment as affecting the character of the commerce under which the commodity was delivered to such purchaser. The Court in this case held that the intention or purpose on the part of the owner of an interstate shipment of a car load of grain, which was shipped from Hudson, S. D., to Texarkana, Texas, to forward such car from Texarkana to another point in the State of Texas, did not so connect the second shipment with the original shipment as to consti-

tute the second an interstate shipment and as such exempt from the regulation of the State Railroad Commission. The case is an important one inasmuch as Justice Brewer makes clear in the opinion that the character of the shipment or business transaction thereunder must be determined by it as made, and not as co-related by purpose or intention with prior or subsequent transactions. The opinion says, in part:

“Whatever may have been the thought or purpose of the Hardin Company in respect to the further disposition of the corn was a matter immaterial so far as the completed transportation was concerned. In this respect there is no difference between an interstate passenger and an interstate transportation. If Hardin, for instance, had purchased at Hudson a ticket for interstate carriage to Texarkana, intending all the while after he reached Texarkana to go on to Goldthwaite, he would not be entitled on his arrival at Texarkana to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite. The one contract of the railroad company having been finished, he must make a new contract for his carriage to Goldthwaite, and that would be subject to the law of the State within which that carriage was to be made.

The question may be looked at from another point of view: Supposing a car load of goods was shipped from Goldthwaite to Texarkana under a bill of lading calling for only that transportation, and supposing that the laws of Texas required, subect to penalty, that such goods should be carried in a particular kind of car—can there be any doubt that the carrier would be subject to the penalty, although it should appear that the shipper intended, after the goods had reached Texarkana, to forward them to some other place outside the State? To state the question in other words,—

if the only contract of shipment was for local transportation, would the State law in respect to the mode of transportation be set one side by a Federal law in respect to interstate transportation, on the ground that the shipper intended, after the contract of shipment had been completed, to forward the goods to some place outside the State? *Coe v. Erroll*, 116 U. S. 517."

As we have pointed out, the case at bar involves rather the law of vendor and purchaser than any question of a carrier, whether intrastate or interstate. There was no contract of shipment of either kind, and the duty of the United Fuel Gas Company to the three companies was and is wholly discharged by the delivery to it in West Virginia of the respective quantities of gas called for in the contracts without any reference whatever as to how such gas is brought to the point of delivery.

The case of *Texas & New Orleans Railroad v. Sabine Tram Co.*, 227 U. S. 111, rests upon the particular facts thereof and fully recognizes the authority of the cases hereinbefore cited. In that case the Court held that the lumber involved was ordered, manufactured, and shipped for export, and that all of the lumber involved in that case and all of the lumber involved in similar shipments during the years 1905 and 1906 were so intended, ordered, manufactured, and shipped for export. The facts found included findings that the purchaser of such lumber had never done *any local business whatever* at the point of delivery; that the shipments were accompanied by waybills (with which, however, the shipper had no connection) made by the Railroad Company and marked "For Export"; and, specifically, that such shipments, with others, "constituted a large and constantly recurring course of foreign commerce passing out through the port of Sabine." It is in evident recognition of and in conformity with the decision of this Court in such case that

the court below held that in as much as *all* of the gas delivered by the United Fuel Gas Company at the Ohio River to the Ohio Fuel Supply Company was delivered for continuous and uninterrupted further transportation in interstate commerce it was not subject to the tax or to be used as a measure thereof. The opinion makes plain that it was because of the absence of this element, and due to the fact the gas delivered to the three other companies was not for such further uninterrupted transportation in interstate commerce, but was for transportation and sale either within or without the State at the election of said companies, that the court differentiated between the other three purchasing companies and said Ohio Fuel Gas Company.

PLAINTIFF IN ERROR'S SIXTH POINT OF ARGUMENT.

"The intrastate business of plaintiff in error in the transportation of gas from the points of production in West Virginia to other localities in the same State where it is sold to consumers is conducted by plaintiff in error as a public service regulated by the Public Service Commission of said State and generally under obligations created by franchises from municipalities. The same pipe lines are used for the transportation of gas in this service as those used for its transportation outside the State. Plaintiff in error, therefore, not having power voluntarily to withdraw from a public service in West Virginia is required by the decisions under review to pay the tax upon its intrastate business as a condition precedent to continuing the interstate transportation in which it is engaged."

With deference, we submit that the above proposition is erroneous in many respects:

First, it assumes, without basis in the record, that the

plaintiff can not, under proper conditions, withdraw from its public service in West Virginia.

Second, it is directly contrary to the opinion and effect of the decision in this case, in that it assumes that such decision in any way requires it to pay the tax upon its intrastate business, as a condition precedent to continuing the interstate business in which it is engaged. The opinion plainly and emphatically decides and holds the exact contrary of such assumption.

Third, it is further erroneous in assuming that even if it could not withdraw from its intrastate business there is anything in the law or in any decision which has been cited which tends to hold that a tax imposed by a state upon a corporation which does both an intrastate and an interstate business for the privilege of carrying on its *intrastate* business is invalid or presents any Federal question, unless, of course, such a tax is of such a character as to amount to confiscation, taking property without due process of law, denying the equal protection of the laws, or otherwise violative of some express constitutional guarantee. Certainly, it can not successfully be claimed that the imposition of a tax as a condition for continuing intrastate business is invalid simply because the taxpayer also carries on an interstate business.

The case of *Bowman v. Continental Oil Company*, Adv. Sheets July 15, 1921, page 720, heretofore cited, would foreclose such contention if it were an open question.

The case of *Postal Telegraph Co. v. City of Freemont*, Adv. Sheets April 15, 1921, page 377, is also directly in point. This case holds that a municipal license tax imposed by the City of Freemont, Nebraska, upon the privilege of doing an intrastate telegraph business can not be said to be in effect a burden upon the telegraph company's interstate business merely because its intrastate business in that city, which the company asserted it was compelled by statute to continue to carry on at the rates therein

prescribed, might be insufficient to pay the tax, where any deficit might be obviated by application for an increase of intrastate rates.

To the same effect is the case of *Postal Telegraph Co. v. City of Richmond*, 249 U. S. 252, 63 L. Ed. 590, which holds that wherever the local business purported to be taxed is sufficiently substantial in amount to prevent it from clearly appearing that the tax is a disguised attempt to tax interstate commerce, such a tax is valid.

We call attention to the fact that in the case at bar it was never claimed or contended by the plaintiff that the tax in question was, as to it, confiscatory. Further, it is set up in the answer, and not denied, that its purely local business within the State of West Virginia "amounts to many millions of dollars per annum" and the plaintiff's bill and the stipulation of facts both make it affirmatively appear that during the year ending June 30th, 1919, it sold to its own consumers exclusive of gas sold the three purchasing companies, wholly within West Virginia, more than eleven and one-half billion cubic feet of natural gas.

The brief on behalf of the plaintiff in error cites in support of this point of argument, in addition to the case of *Bowman v. Continental Oil Co.*, heretofore cited, and discussed, the following cases, *Pullman Co. v. Adams*, 189 U. S. 420; *Allen v. Pullman Co.*, 191 U. S. 171; and *Unâerwood Typewriter Co. v. Chamberlain*, 254 U. S. 113.

An examination of these cases makes it clear that they involve wholly different grounds of attack from the case at bar. Thus in *Pullman Co. v. Adams*, *supra*, the Mississippi privilege tax on sleeping car companies, which was sustained, imposed a tax "on each sleeping and palace car company carrying passengers from one point to another within the State, \$100.00, and twenty-five cents per mile for each mile of railroad track over which the company runs its cars". The company there attempted

by pleas and by an offer of evidence to bring before the court the fact that its receipts from intrastate passengers did not equal the expenses chargeable against such receipts. It contended that these facts would show that the business within the State was merely a burden on its interstate commerce, while at the same time, it argued, it was compelled to assume that burden under the Constitution of Mississippi, § 195, which declared sleeping car companies to be common carriers subject to liability as such. The pleas were held bad on demurrer, the evidence was rejected and a verdict was directed for Adams, the State revenue agent, and the judgment rendered upon such verdict was in all respects affirmed by this Court.

It is obvious from the opinion that the Federal question considered by this Court arose only because of the plea tendered and evidence offered to show confiscation, that is, that the net intrastate revenues of the company were not sufficient to pay the tax in question, that the company was obliged to continue such service, and that the tax therefor must be paid out of its interstate revenues and constituted a burden upon its interstate commerce. Under this situation it might well be, as this court said, that the Pullman Company was entitled to know how it stood as to the right to discontinue its intrastate service, but no such right is involved in the case at bar, where it is not clear that the intrastate revenues are not abundantly sufficient to pay the privilege tax for continuing such intrastate business.

So, again, in *Allen v. Pullman Palace Car Company*, *supra*, a tax by the State of Tennessee for \$3,000.00 on sleeping car companies "for one or more passengers taken up at one point in this State and delivered at another point in this State and transported wholly within the State" was sustained, despite the argument advanced in that case, practically identical with the argument in the case of *Pullman Co. v. Adams*. Answering such ar-

gument the Court, speaking through Mr. Justice Day, said:

"If the payment of this tax was compulsory upon the company before it could do a carrying business within the state, and the burden of its payment, because of the minor character of the domestic traffic, *rested mainly upon the receipts from interstate traffic*, there would be much force in this objection. Upon this proposition we are unable to distinguish this case from *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494, decided at the last term, wherein it was held that the privilege tax imposed by the state of of Mississippi, upon each car carrying passengers from one point in the state to another therein, was a valid tax, notwithstanding the fact that the company offered to show that its receipts from the carrying of the passengers named did not equal the expenses chargeable against such receipts."

In that case it was further held, however, that under the laws of Tennessee the Pullman Company could decline local business, if it saw fit, thereby avoiding the tax entirely.

The case of *Underwood Typewriter Company v. Chamberlain*, Adv. Sheets Dec. 15, 1920, page 50, (erroneously cited as 254 U. S. 113), was cited by the plaintiff in error under this head. We are at a loss to understand why this case is cited for such purpose, as, so far as it goes, it is squarely against the contentions of the plaintiff in error. It involved the validity of a tax in Connecticut imposed, among others, upon manufacturing and trading companies and required the payment of a tax of two per cent upon their net income earned during the preceding year from business carried on within the State. It provided a method of determining the proportion of net income earned within the State in the following manner: The corporation was required to state in its an-

nual return from what general source its profits were principally derived. If the net profits were derived principally from ownership, sale or rental of real property, or from the sale or use of tangible personal property the tax was imposed on such proportion of the whole net income as the fair cash value of the real and the tangible personal property within the State bore to the fair cash value of all the real and tangible personal property of the Company. If the net profits were derived principally from intangible property the tax was imposed upon such proportion of the whole net income as the gross receipts within the State bore to the total gross receipts of the Company.

Sustaining the validity of the statute and tax this Court, through Mr. Justice Brandeis, said, in part:

“A tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce, even if it takes the form of a tax for the privilege of exercising its franchise within the State. *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, 695, 39 L. Ed. 311, 315; 5 Interstate Commerce Reports 1, 15 Sup. Ct. Rep. 268, 360. This tax is based upon the net profits earned within the State. That a tax measured by net profits is valid, although these profits may have been derived, in part, or in the main, from interstate commerce, is settled. *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 62 L. Ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E 748; *Shaffer v. Custer*, 252 U. S. 37, 57, 64 L. Ed. 445, 458, 40 Sup. Ct. Rep. 221; Compare *Wm. E. Peck & Co. v. Lowe*, 247 U. S. 165, 62 L. Ed. 1049, 38 Sup. Ct. Rep. 432. Whether it be deemed a property tax or a franchise tax, it is not obnoxious to the commerce clause.”

The case at bar is readily distinguishable from the case of *Leloup v. Mobile*, 127 U. S. 640, 32 L. Ed. 311, which held invalid an ordinance requiring a license tax

which affected the whole business, intrastate and interstate, of the company.

We submit that the case at bar comes squarely within the principle of *Osborne v. Florida*, 164 U. S. 640, 41 L. ed. 586, and many other cases which sustain similar statutes, particularly where such statutes have been construed by the highest courts of the respective States as affecting only business local in its character.

We venture the assertion that the decision of no State court can be found which more clearly defines and limits similar taxation to the right to carry on a purely intrastate business, and more clearly limits the right to use only such intrastate business as the measure of the amount of the tax, than does the opinion of the Supreme Court of Appeals of West Virginia in the instant case.

PLAINTIFF IN ERROR'S SEVENTH POINT OF ARGUMENT.

"The arbitray power given to the State Tax Commissioner by the statute in question, resulting from the failure of said statute to provide a definite measure of the said tax, operates to deprive plaintiff in error of its property without due process of law and to deny to it the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States."

To this we would reply as follows:

(a) There is no arbitrary power given the State Tax Commissioner either by statute or under the decision of the court below. So far as appears from the record gas is purchased and sold at a uniform pressure. If so, it would be the manifest duty of the State Tax Commissioner to adopt such uniform pressure as the basis of tax measurement. If, as matter of fact, gas is purchased

and sold under different pressures, it would be the duty of the State Tax Commissioner to adopt the pressure ordinarily used in the course of trade throughout the State. As pointed out in the court's opinion, it is certainly an anomalous situation if the pressure at which the plaintiff company handles its gas is amply sufficient for it to buy and sell under, and to specify the exact number of cubic feet handled by it at each point in the State, and in intrastate and interstate business, and yet would be insufficient as a basis for any tax calculation. Certainly it can not be assumed in advance that an administrative regulation, to be adopted in the future, by the State Tax Commissioner will be either illegal, arbitrary or unreasonable.

It is a matter of common knowledge that gas transported under any given pressure can be taken from the meter reading and, such given pressure being fixed, the amount determined by simple mathematical tables and formulas at any desired pressure. For instance, the quantity of gas transported under a ten pound pressure per inch, can, by such tables, be at once determined upon the basis of eight ounces per inch pressure. Therefore the fact that gas may be transported by the plaintiff at different points under different pressures presents no obstacle whatever in the determination of the quantity of gas transported by it at any given and uniform pressure.

(b) It is well settled that a claim that a state statute imposing a license tax is void because not sufficiently determinate, definite or certain in its character does not involve a Federal question, and the determination of the State court as to that is conclusive upon this Court.

Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586.

Certainly the case cited by plaintiff in error, *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, is without application or analogy. In that case an ordinance of the Board of Supervisors of San Francisco County, California, requir-

ed permission to be obtained from the Board of Supervisors to carry on a laundry business, and such ordinance plainly vested such board with absolute and arbitrary discretion to grant such consent or to refuse the same and to grant it to one person and refuse it to another situate in exactly and precisely the same conditions and desiring to carry on such business in exactly and precisely the same way. Such ordinance was held void as attempting to confer a purely arbitrary power of discretion between citizens and others occupying exactly similar positions. If, in the case at bar, the State Tax Commissioner should attempt to prescribe regulations operating differently and in a discriminatory manner upon persons and corporations whose businesses and conditions were exactly the same, such regulations could, of course, be reviewed by the Courts and would not be sustained, but it can **certainly not be assumed and anticipated in advance** that any such unjust and discriminatory regulations will be promulgated or attempted by such officer.

Upon the whole case we respectfully submit that there is no substantial Federal question presented for review by this Court; that the sale and delivery of gas by the plaintiff company at points in West Virginia to Columbia Gas & Electric Company, Hope Natural Gas Company and Pittsburgh and West Virginia Gas Company are sales in intrastate commerce; that the carrying on of this portion of the plaintiff's business is a purely intrastate business, subject to taxation by the State of West Virginia, and that the amount of the privilege tax imposed thereon can validly be measured by the amount of such intrastate business; and, finally, that if this Court should determine that a substantial Federal question is presented by the record, justifying review by this Court upon either writ of error or certiorari, that the judgment of the Supreme Court of Appeals of West Virginia, sustaining the validity of the statute in question so far as applicable to and

measured by the local business done by the plaintiff company within said State, is correct and should be affirmed.

Respectfully submitted,

E. T. ENGLAND,

Attorney General of West Virginia,

S. B. AVIS,

F. O. BLUE,

WM. GORDON MATHEWS,

Counsel for the Defendants in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

UNITED FUEL GAS COMPANY, a corporation,
Plaintiff Below, Plaintiff in Error,

VS.

WALTER S. HALLANAN, State Tax Commis-
sioner of the State of West Virginia, and
E. T. ENGLAND, Attorney General of the
State of West Virginia,
Defendants Below, Defendants in Error.

No. 835
on writ
of error.

Sirs:

You, as counsel for the Plaintiff in Error, will please take notice that we, the Defendants in Error, shall move the motions hereto annexed, before the Supreme Court of the United States, at the Capitol, in the City of Washington, District of Columbia, on Monday, the 2nd day of May, 1921, at the opening of the Court on that day, or as soon thereafter as counsel can be heard.

Dated at Charleston, West Virginia, this 14th day of
April, 1921.

D. B. Davis

Fred O. Blue

Wm Gordon Matthews

Counsel for Defendants in Error.

To Messrs :

R. G. ALTIZER,

MALCOLM JACKSON,

E. W. KNIGHT,

Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

UNITED FUEL GAS COMPANY, a corporation,
Plaintiff Below, Plaintiff in Error,
vs.

WALTER S. HALLANAN, State Tax Commis-
sioner of the State of West Virginia, and
E. T. ENGLAND, Attorney General of the
State of West Virginia,
Defendants Below, Defendants in Error.

No. 835.

**MOTIONS OF DEFENDANTS TO ADVANCE AND
THAT THIS CASE BE HEARD TOGETHER WITH
THE CASE OF THE EUREKA PIPE LINE COMPANY,
A CORPORATION, AGAINST WALTER S. HAL-
LANAN, STATE TAX COMMISSIONER, AND E. T.
ENGLAND, ATTORNEY GENERAL.**

The Defendants, Defendants in Error, respectfully move
this court as follows:

FIRST.

That the submission and hearing of this case be ordered
advanced and that it be submitted and heard at the earli-
est date which the convenience and the docket of this
Honorable Court will permit. As reasons for this mo-
tion said Defendants respectfully show:

(a) That this case involves the validity of a revenue statute enacted by the State of West Virginia, to-wit, chapter 5 of the Acts of the Legislature of the State of West Virginia at the Extraordinary Session thereof in the year 1919, imposing a privilege tax on persons, firms and corporations engaged in the transportation of crude oil or petroleum, or the distillates thereof, or of natural gas, by means of pipe lines in said State of West Virginia and making provisions for the collection of such tax.

(b) Said statute became effective and applied to the fiscal year commencing July 1st, 1919, and each succeeding year, and the revenues to be derived by said state therefrom as a privilege tax from the corporations affected thereby, were and are estimated to be approximately \$400,000.00, as said statute has been construed by the Supreme Court of Appeals of West Virginia as limited to intrastate commerce only, as carried on by said corporations, and as so construed and limited, has been upheld by said court.

(c) Said revenues under said statute have been by the institution of this suit, and other suits, wholly suspended for the fiscal years commencing July 1, 1919, and July 1, 1920, and will be suspended and cannot be collected pending the final determination of such litigation and the judgment of this Honorable Court as to the validity of said statute, as so construed by the Supreme Court of Appeals of the State of West Virginia.

(d) Since the institution of this litigation the State of West Virginia and the Legislature thereof have been and continue to be seriously embarrassed and handicapped by uncertainty as to the validity of said statute, and also in determining what other and additional revenues are

necessary to meet the expenditures of said state. The uncertainty as to the validity of said statute, as a means of itself producing revenue, and the necessity for the enactment of other and similar legislation, the validity of which would be dependent upon the validity of said statute, can only be determined by the final judgment of this Honorable Court herein.

(e) Because it appears from the message of the Governor of West Virginia to the Legislature of said State, which Legislature is now in session, and also from the Budget Bill prepared in accordance with the constitution of said State and submitted to said Legislature, that said state is now confronted with a very large deficit, estimated to be as of June 30, 1921, approximately \$1,300,000.00. This deficit, as appears from said message and Budget Bill is in large part due, first to the inability of said state to collect any part of the privilege tax provided by said chapter 5 of the Acts of the Legislature of 1919, Extraordinary Session, on account of the pendency of this litigation, and secondly, because said Supreme Court of Appeals of the State of West Virginia construed and limited said statute as applicable only to the intra-state business done by the corporations subject thereto, thus greatly reducing the estimated amount expected to be derived from said privilege tax. It is therefore apparent that an early decision of this Honorable Court as to the validity of said statute, is essentially important to the State of West Virginia, both in order that it may collect the taxes properly collectible under said statute, and also to enable it to determine what other and additional legislation and taxation is necessary to raise revenues sufficient to meet the necessary state expenditures.

For these reasons these Defendants respectfully move this Honorable Court that this case be advanced and set

for hearing at such early date as the convenience of the Court and the condition of its docket will permit.

SECOND.

Said Defendants also respectfully move this Honorable Court that this case be ordered heard together with the case of the Eureka Pipe Line Company, a corporation, Plaintiff below, Plaintiff in error, against Walter S. Hallanan, State Tax Commissioner, and E. T. England, Attorney General, No. 805, pending in this court upon writ of error awarded to the Supreme Court of Appeals of the State of West Virginia.

Said Defendants, in support of this motion that said cases be heard together, respectfully show that the two cases involve the validity of the same statute of West Virginia which is attacked therein upon substantially identical grounds. The bills of complaint, aside from differences in description of details of the businesses carried on by the Plaintiffs therein, respectively, make substantially the same allegations and attack the validity of said statute for the same alleged conflicts with the Federal constitution; the answers, while in parts varied to conform to the verbiage of the respective bills, are substantially similar, and in those parts affirmatively justifying the statute and its enactment are alike; said cases were heard, argued and submitted together in the Circuit Court of Kanawha County, West Virginia, and also in the Supreme Court of Appeals of the State of West Virginia, and while separate orders were entered in both courts, yet but one opinion was rendered in both cases by said Supreme Court of Appeals. Under these circumstances the Defendants believe, and respectfully submit, that a proper and typical

case is presented for an order directing that these cases be heard and submitted together.

E. T. ENGLAND,
Attorney General of West Virginia,
WALTER S. HALLANAN,
State Tax Commissioner of West Virginia,
By Counsel.

S. B. AVIS,
FRED O. BLUE,
WM. GORDON MATHEWS,
Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

UNITED FUEL GAS COMPANY, a Corporation,
Petitioner,

vs.

WALTER S. HALLANAN, Tax Commissioner of the
State of West Virginia, and E. T. ENGLAND, At-
torney General of the State of West Virginia,
Respondents.

(Same case pending on writ of error as No. 835)

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA, AND BRIEF
IN SUPPORT OF SAID PETITION.

*To the Honorable Edward D. White, Chief Justice of the
United States, and to the Associate Justices of the Su-
preme Court of the United States:*

Your petitioner, United Fuel Gas Company, a corpor-
ation of West Virginia, respectfully shows that it is
aggrieved by a final decree of the Supreme Court of Ap-
peals of the State of West Virginia in a suit in equity
brought by your petitioner as plaintiff against Walter S.

Hallanan, as Tax Commissioner of the State of West Virginia, and E. T. England, as Attorney General of said State, as defendants, which decree was made by said Supreme Court of Appeals of West Virginia on the 26th day of November, 1920, and became final on the 12th day of January, 1921, the said Supreme Court of Appeals of West Virginia having on the 30th day of November, 1920, made an order directing that its said decree of November 26, 1920, should become final unless within thirty days thereafter a petition for rehearing should be filed, and your petitioner having, within said period of thirty days from and after November 26, 1920, to-wit, on or about the 23rd day of December, 1920, filed a petition for rehearing in said Supreme Court of Appeals, and the said Supreme Court of Appeals having by its final decree of the 12th day of January, 1921, denied the said petition for rehearing of said cause and directed that its former decree of the 26th day of November, 1920, be made absolute and final. A certified copy of the entire transcript of the record of said cause in which said final decree was entered as aforesaid, including the proceedings in said Supreme Court of Appeals of West Virginia, is presented herewith as a part of this petition.

Your petitioner expressly avers, as from said transcript will appear, that in and by said suit in equity so instituted by your petitioner there was especially set up and claimed by your petitioner, in its bill of complaint and otherwise, a title, right, privilege or immunity under the Constitution of the United States, to-wit, under the commerce clause of Section 8 of Article I thereof, and also the Fourteenth Amendment thereto, and the final decision and decree of said Supreme Court of Appeals of West

Virginia was against the title, right, privilege or immunity so set up or claimed by your petitioner.

The following is a summary and short statement of the matter involved in said suit and the general reasons relied upon for the allowance of a writ of certiorari to the said Supreme Court of Appeals of West Virginia.

STATEMENT.

FIRST. On the 26th day of August, 1919, your petitioner instituted a suit in chancery against the above named respondents as defendants, and thereupon filed against them its bill of complaint, in the Circuit Court of Kanawha County; West Virginia, a court of general jurisdiction of said state and having jurisdiction of the suit so instituted, praying that the said defendants, in their official capacities as Tax Commissioner and Attorney General, respectively, of the said State of West Virginia, be perpetually enjoined from enforcing or attempting to enforce against your petitioner, as complainant in said suit, any of the provisions of a certain statute enacted by the Legislature of the State of West Virginia at the extraordinary session thereof in the year 1919, which was signed and approved by the Governor of said state to become effective on the 1st day of July, 1919, and known as Chapter 5 of the Acts of said session, entitled:

“An Act to levy a privilege tax on any person, firm, or corporation engaged in the transportation of crude oil or petroleum, or the distillates thereof, or of natural gas, by means of pipe lines, and authorizing the state tax commissioner to provide rules and regulations for the collection of

such tax, and defining the duties of the state tax commissioner."

A copy of said statute was exhibited with said bill of complaint. The said statute purports to impose a tax upon the privilege of transporting, by pipe lines, crude oil or petroleum, or the distillates thereof, or natural gas, and provides in Section 2 that every person, firm or corporation engaged in the State of West Virginia in the transportation of either crude oil or petroleum, or the products and distillates thereof, or of natural gas, or both, by means of pipe lines, for sale to consumers within or without the state, or use within or without the state in the making of any products derived therefrom, shall pay to the state, as an annual privilege tax for engaging in such business in the state, two cents for each barrel of crude oil or petroleum, or the distillates thereof, and one-third of one cent for each thousand cubic feet of such natural gas as is so transported or conveyed within said state, with a proviso that only one such tax annually shall be required. In its said bill of complaint your petitioner set forth in great detail the character of the business at that time and for some years previously conducted by it in the transportation of natural gas, and showed that it transported, by means of pipe lines owned and operated by it, large quantities of natural gas from gas wells located chiefly upon lands in the State of West Virginia, for sale and use in some instances in said State of West Virginia, but mainly for such sale and use in the adjoining states of Ohio, Kentucky and Pennsylvania. That a comparatively small quantity of such gas was also transported by your petitioner, through pipe lines owned and operated by it, from wells located upon lands in the

State of Kentucky, for sale and use partly in said State of Kentucky and partly in the States of Ohio and West Virginia. That all of said natural gas was and is so transported by your petitioner as the owner thereof, it having acquired the same before the transportation was commenced, partly from gas wells which it owned and operated and partly by purchase from owners of other gas wells.

It was claimed by your petitioner, in its pleadings and argument in said cause, that the said statute was void as applied to your petitioner and the business conducted by it of transporting natural gas, for the following reasons :

(a) Because said statute upon its face purported to levy a tax upon the privilege of transporting natural gas for sale to consumers either within or without the State of West Virginia, and was, therefore, a direct and immediate burden upon interstate commerce in which your petitioner was and is engaged in the transportation of natural gas from the points of production thereof in the State of West Virginia to points without said state, and especially so since the amount of such tax was made to depend upon the volume of such interstate commerce, and the payment of said tax was made a condition precedent of the right to engage or continue in such interstate transportation, contrary to the commerce clause of Section 8 of Article I of the Constitution of the United States.

(b) Because the measure of said tax upon the privilege of transporting natural gas was so indefinite and uncertain, in that it required the payment of one-third of one cent for each thousand cubic feet of natural gas transported by pipe line, without any specification of the

pressure at which the quantity of gas should be determined, as to give the State Tax Commissioner arbitrary power in determining the amount of said tax, since natural gas was necessarily transported by petitioner and others subject to the tax, at pressures varying from four ounces to above four hundred pounds to the square inch, and therefore, denied to your petitioner the equal protection of the laws and deprived petitioner of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

SECOND. The defendants in said suit answered the said bill of complaint and denied that said statute was in violation of the Constitution of the United States or any part thereof, but all questions of fact which were put in issue, as distinguished from questions of law, were eliminated by a stipulation entered into between your petitioner and said defendants, which stipulation was made a part of the record. Said Circuit Court, by its final decree of the 14th day of September, 1920, adjudged and decreed that the said statute levying said tax, in so far as it applied to the transportation of natural gas by your petitioner, was wholly void because in conflict with the commerce clause of Section 8 of Article I of the Constitution of the United States, and also because of its uncertainty and indefiniteness in the method provided for the measurement of said tax as applied to the transportation of natural gas, and perpetually enjoined the defendants from enforcing the said statute against your petitioner.

Thereafter the said defendants obtained an appeal from said decree to the Supreme Court of Appeals of West Virginia, which latter is the highest court of said state having jurisdiction over said suit, and upon the hearing of

said appeal the said Supreme Court of Appeals entered the final decree of which this petition seeks a review, in and by which decree there was affirmed in part and reversed in part the decree of said trial court, and the said statute levying the said tax was construed as being for the privilege of engaging in intrastate commerce within the State of West Virginia and not extending to or including any tax upon the privilege of transporting natural gas in interstate commerce, as such interstate commerce was defined in the opinion of said Supreme Court of Appeals accompanying and referred to in its said final decree. The substance of said final decree, as interpreted by said written opinion accompanying the same, was to adjudge and decree that said statute was valid and constitutional to the extent that it levied a tax upon your petitioner upon that part of the business conducted by it in the transportation of natural gas which the said court adjudged to be transactions in intrastate commerce, but said statute did not apply to that part of the business of your petitioner in the transportation of natural gas which the said court adjudged to be transactions in interstate commerce, and the said decree of said Circuit Court granting said injunction was reversed in so far as it inhibited the defendants from collecting said tax upon such part of the business of your petitioner which consisted of the transportation of natural gas in intrastate commerce, as such intrastate commerce was defined by the written opinion of said Supreme Court of Appeals, and affirmed said decree of the Circuit Court in so far as it enjoined the defendants from exacting said tax upon that part of the business of your petitioner consisting of the transportation of natural gas in interstate commerce, as such interstate commerce was defined by

the written opinion of said Supreme Court of Appeals. The said Supreme Court of Appeals also overruled the contention of your petitioner and reversed said Circuit Court as to the finding of the latter that said statute was void for uncertainty or because of vesting arbitrary power in the State Tax Commissioner.

GENERAL REASONS RELIED ON FOR THE ALLOWANCE OF A WRIT OF CERTIORARI.

Your petitioner now avers that said Supreme Court of Appeals of West Virginia erred to the prejudice of your petitioner in adjudging and decreeing that certain parts of the business conducted by your petitioner in the transportation of natural gas, were transactions in intrastate commerce, and in upholding the validity of said tax with respect thereto, which parts of said business your petitioner avers were and are transactions in interstate commerce and the tax upon the privilege of conducting the same in violation of Section 8 of Article I of the Constitution of the United States. The parts of said business so conducted by your petitioner in interstate commerce as to which said Supreme Court of Appeals made such erroneous adjudication and decree, are as follows:

(a) The transportation by petitioner, through its pipe lines, during the year ending July 1, 1919, of 7,567,363 M cubic feet of natural gas from the points of production of such natural gas in the State of West Virginia to another point in said state, where all of the same was delivered to Columbia Gas & Electric Company under a contract between your petitioner and said Columbia Gas & Electric Company for such sale and delivery at said point, with the express intention and purpose on the

part of both your petitioner and said purchasing company that substantially all of said natural gas so transported and delivered by your petitioner should be further transported by said purchasing company, without interruption in its flow and by means of a connecting pipe line owned and operated by said purchasing company, to localities outside the State of West Virginia, there to be sold and consumed, and at least 99% of all the natural gas so delivered by your petitioner to said purchasing company having been actually so transported by the latter to points outside the State of West Virginia, where it was sold and consumed, not more than 1% thereof having been consumed in the State of West Virginia, and the part thereof so transported outside said state, to-wit, at least 99% of the whole, not having come to rest for any purpose within the State of West Virginia after the commencement of its journey from the point of production.

(b) The transportation by petitioner, through its pipe lines, during the year ending July 1, 1919, of 7,961,333 M cubic feet of natural gas from the points of production of such natural gas in the State of West Virginia to another point in said state, where all of the same was delivered to Hope Natural Gas Company under a contract between your petitioner and said Hope Natural Gas Company for such sale and delivery at said point, with the express intention and purpose on the part of both your petitioner and said purchasing company that the greater part of said natural gas so transported and delivered by your petitioner should be further transported by said purchasing company, without interruption in its flow and by means of a connecting pipe line owned and operated by said purchasing com-

pany, to localities outside the State of West Virginia, there to be sold and consumed, and at least 67% of all natural gas so delivered by your petitioner to said purchasing company having been actually so transported by the latter to points outside the State of West Virginia, where it was sold and consumed, not more than 33% thereof having been consumed in the State of West Virginia, and the part thereof so transported outside said state, to-wit, at least 67% of the whole, not having come to rest for any purpose within the State of West Virginia after the commencement of its journey from the point of production.

(c) The transportation by petitioner, through its pipe lines, during the year ending July 1, 1919, of 7,270,429 M cubic feet of natural gas from the points of production of such natural gas in the State of West Virginia to another point in said state, where all of the same was delivered to Pittsburgh & West Virginia Gas Company under a contract between your petitioner and said Pittsburgh & West Virginia Gas Company for such sale and delivery at said point, with the express intention and purpose on the part of both your petitioner and said purchasing company that the greater part of said natural gas so transported and delivered by your petitioner should be further transported by said purchasing company, without interruption of its flow and by means of a connecting pipe line owned and operated by said purchasing company, to localities outside the State of West Virginia, there to be sold and consumed, and at least 88% of all the natural gas so delivered by your petitioner to said purchasing company having been actually so transported by the latter to points outside the State of West Virginia, where it was sold and consumed, not more than

12% thereof having been consumed in the State of West Virginia, and the part thereof so transported outside said state, to-wit, at least 88% of the whole, not having come to rest for any purpose within the State of West Virginia after the commencement of its journey from the point of production.

The said Supreme Court of Appeals also erred to the prejudice of your petitioner in overruling the contention of your petitioner that said statute was void as applied to the business of petitioner, because said statute fails to prescribe a sufficiently definite and certain measure of the tax attempted to be imposed and gave to the State Tax Commissioner arbitrary power in fixing the amount of such tax, inasmuch as said statute failed to specify any pressure at which the flow of gas should be computed, while your petitioner, in the conduct of its business, necessarily transports such gas at pressures varying from four ounces to more than four hundred pounds to the square inch.

Your petitioner now shows that on or about the 10th day of March, 1921, it applied to, and obtained from, the Chief Justice of the United States a writ of error to the said Supreme Court of Appeals of West Virginia, for the purpose of reviewing and reversing said final decree of said court, and the matters arising upon said writ of error are now pending in the Supreme Court of the United States, but your petitioner is advised that there is doubt as to whether or not the errors committed by said Supreme Court of Appeals of West Virginia in its said final decree are properly reviewable in the Supreme Court of the United States upon writ of error, and that if the same are not properly reviewable and cannot be fully corrected by proceedings upon writ of error, that

the Supreme Court of the United States will review and correct said errors upon writ of certiorari.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of, and under the seal of, this court, directed to the Supreme Court of Appeals of West Virginia, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Supreme Court of Appeals of West Virginia in said cause, which was entitled in that court "United Fuel Gas Company, Plaintiff Below, Appellee, v. Walter S. Hallanan, State Tax Commissioner, et al., Defendants Below, Appellants, No. 4201"; that said cause may be reviewed and all errors in the final decree of said Supreme Court of Appeals, to the prejudice of your petitioner, corrected by this court as provided by law, and, to the extent necessary for that purpose, said final decree of the Supreme Court of Appeals of West Virginia be reversed and annulled; and that your petitioner may have such other and further relief or remedy in the premises to which it may be entitled. And your petitioner will ever pray, etc.

UNITED FUEL GAS COMPANY,

Petitioner,

By Malcolm Jackson,

E. W. Knight
April 7th 1921 Its Attorneys.

State of West Virginia,)
County of Kanawha,) ss:

L. A. Seyffert, being first duly sworn, deposes and says that he is Secretary and Treasurer of United Fuel Gas Company, a corporation, the above named petitioner; that he has read the foregoing petition and is authorized to make this affidavit; and that the facts therein alleged are true, to the best of his knowledge, information and belief.

L. Seyffert

Taken, sworn to and subscribed before the undersigned
Notary Public, this 7 day of April, 1921.

L.H. Bobbitt / Sec

My commission expires

Notary Public.

4th day of Apr, 1929.

I hereby certify that I have examined the foregoing petition, and, in my opinion, the petition is well founded, and that this cause is one in which the prayer of the petitioner should be granted by the Supreme Court of the United States.

Edw Knight
Of Counsel for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1920.

UNITED FUEL GAS COMPANY, a corporation,
Petitioner,

vs.) No. 835 on writ of error.

WALTER S. HALLANAN, Tax Commissioner of the
State of West Virginia, and E. T. ENGLAND,
Attorney General of the State of West
Virginia, Respondents.

BRIEF OF UNITED FUEL GAS COMPANY IN SUPPORT OF ITS
PETITION FOR WRIT OF CERTIORARI.

This suit was brought to challenge the validity of a statute passed by the Legislature of the State of West Virginia at its extraordinary session in the year 1919, levying a tax upon the privilege of engaging or continuing in the business of transporting crude oil or petroleum, or the distillates thereof, or natural gas, by means of pipe lines. Said statute is copied at length in an appendix hereto. The plaintiff was not engaged in the transportation of crude oil or petroleum, or the distillates thereof, but was and is engaged in the transportation of natural gas, by means of pipe lines, both in *intrastate* commerce

and *interstate* commerce. The bill of complaint sought to enjoin the tax authorities of the state from enforcing the statute, or any part thereof, against the plaintiff, upon the ground that the statute was in violation of both the Federal and State Constitutions. It is assumed that the decision of the Supreme Court of the State in favor of the validity of said statute under the Constitution of the State, will not be reviewed in this court, and such issues will be eliminated, so far as possible, in the statement of the controversy.

The statute, by its terms, in so far as it applied to the business of transporting natural gas, levied a tax upon the privilege of engaging in such business after the first day of July, 1919, the amount of which tax for each year was to be determined by the quantity of such gas transported during the year preceding, being one-third of one cent per thousand cubic feet for all gas transported "for sale to consumers within or without the state, or use within or without the state in the making of any products derived therefrom." The enforcement of said statute was not by the terms thereof left to the ordinary means of collecting taxes, but payment, at the rate prescribed, upon the business conducted during the preceding year was made a condition precedent of the right to continue to engage in the business during the year commencing July 1, 1919, and subsequent years.

The business of the plaintiff in the transportation of natural gas, by means of pipe lines, may be divided into four classes, for the purpose of stating the ruling with respect thereto of the Supreme Court of Appeals of West Virginia, as to whether such business was interstate commerce.

(1) Gas produced from wells located in the State of West Virginia and transported by the plaintiff through pipe lines owned and operated by it throughout the entire journey, for sale and delivery at points outside said state to consumers, in some instances, and in other instances to other companies which sold and distributed it to consumers.

(2) The transportation of gas from wells located in the State of West Virginia to a point near the boundary line of the State of Ohio, where it was sold and delivered to Ohio Fuel Supply Company. Of the entire quantity taken into this line at the sources of production, a comparatively small part was sold to consumers along the route, but the remainder delivered to said Ohio Fuel Supply Company, and all of that so delivered to the latter was by it transported through a connecting line into the State of Ohio, for sale to consumers.

(3) Gas transported from wells located in the State of West Virginia to other localities in said State, where it was sold by the plaintiff to consumers.

(4) Gas transported by the plaintiff from wells located in the State of West Virginia to two other points in West Virginia, one known as Cedarville and the other as Ball's Gap. Of the gas so transported to Cedarville, approximately one-half was sold and delivered to Hope Natural Gas Company and the remainder to Pittsburgh & West Virginia Gas Company, under contracts with each of said purchasers by which they bound themselves to construct, and afterwards did construct, their connecting pipe lines for further transportation of said gas continuously to localities outside of the State of West Virginia, where the greater part of the gas so delivered

to each of them by the plaintiff was sold and consumed. Of said gas so delivered to said Pittsburgh & West Virginia Gas Company, approximately 88% was transported outside said State for sale and consumption, and of that delivered to said Hope Natural Gas Company approximately 67% was transported outside for like purposes.

All of the gas transported by the plaintiff to Ball's Gap was for sale and delivery to Columbia Gas & Electric Company, under a contract by which the latter bound itself to construct, and afterwards did construct, to said delivery point, a connecting pipe line for the continuous transportation of said gas by the purchaser to localities outside the State of West Virginia for sale and consumption, and at least 99% of the gas so delivered to Said Columbia Gas & Electric Company was by the latter transported outside said State for such purposes.

It was contended by your petitioner, the plaintiff in said suit, that all of the business conducted by it in the transportation of natural gas, as above classified, was interstate commerce in which it was engaged, except that mentioned as (3) above, the exception being the transportation of gas from points of production in West Virginia for sale to consumers thereof in said State. The final decision and decree of said Supreme Court of Appeals, however, in said suit, was that the parts of said business classified as (1) and (2) above, being the case in which your petitioner, through its own lines for the entire distance, transported gas to points outside the State of West Virginia, and the case in which your petitioner transported gas for delivery to the Ohio Fuel Supply Company near the state boundary line, the whole amount so delivered to the purchaser being by the latter transported outside the state, were transactions in inter-

state commerce, but that those parts of the business classified above as (3) and (4) were transactions in intrastate commerce. As stated above, it was conceded by petitioner that its business classified under (3) above is not interstate commerce, so that in so far as there was set up in said suit by your petitioner claims that the statute was in violation of the commerce clause of the Constitution of the United States, there remains only to be reviewed by this court the question of the character of those parts of the business classified under (4) above, which were held by the Supreme Court of Appeals of West Virginia to be transactions in intrastate commerce entirely, as against the claim of your petitioner that the transportation of gas by it for delivery to the three companies named under (4) was interstate commerce, at least to the extent that said gas was, by said purchasing companies, respectively, further transported to points outside the state to be sold.

The petition for a writ of certiorari, however, also seeks to obtain a review of the decision and decree of the Supreme Court of Appeals of West Virginia denying the contention of the petitioner that the statute in question is violative of the Fourteenth Amendment of the Constitution of the United States, in denying to petitioner the equal protection of the laws and depriving it of its property without due process of law, for the reason that arbitrary power is given to the Tax Commissioner in fixing the amount of the tax, inasmuch as it authorizes him to assess a tax of one-third of one cent per thousand cubic feet of gas transported without any specification of the pressure at which the calculation is to be made. The point is that the term "one thousand cubic feet of gas" is meaningless in itself, since gas has the quality of

indefinite expansion. Its chief characteristic is that the molecules of which it is composed are in a constant state of drawing away from each other, and when gas is spoken of in terms of cubic feet, without more, no idea of the quantity of gas is conveyed unless the factor of the pressure to which the gas is subjected in the container is taken into consideration. Natural gas was and is transported by petitioner and others at pressures ranging from four ounces to above four hundred pounds to the square inch, and the Tax Commissioner is left at liberty, under the terms of the statute, to exercise the arbitrary power of selecting his measure between such widely separated limits.

POINTS AND AUTHORITIES RELIED UPON.

I. Natural gas is an article of commerce, and its transportation from one state to another for sale, or in compliance with a contract for its sale and delivery, is interstate commerce.

Public Utilities Commission v. Landon, 249 U. S. 236;

Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 28.

II. In determining whether commerce is *interstate* or *intrastate*, regard must be had to its essential character. Mere billing or the place at which title passes is not determinative.

Ohio R. R. Commission v. Worthington, 225 U. S. 201;

Western Union Tel. Co. v. Foster, 247 U. S. 112;
Western Oil Refining Co. v. Lipscomb, 244 U.
S. 346;
Swift v. U. S., 196 U. S. 398.

III. It follows, therefore, from the circumstances shown by the record, that the transportation and sale of gas by petitioner to four other companies, chiefly for further transportation by the purchasers to points outside the State of West Virginia, were transactions in interstate commerce by petitioner to the extent that said gas was intended to be and actually was transported by the purchasers outside the state for sale and use, notwithstanding said gas was delivered by petitioner to the purchasers in the State of West Virginia.

Ohio R. R. Commission v. Worthington, *supra*;
Public Utilities Commission v. Landon, *supra*;
Pennsylvania Gas Co. v. Public Service Commission, *supra*.

IV. The intrastate business of petitioner in the transportation and sale of gas from the points of production in the State of West Virginia to consumers thereof in the same state, is conducted by petitioner as a public service, regulated by the Public Service Commission of said state. The same pipe lines are used for the transportation of gas in this service as those used for its transportation to points outside the state. If, by reason of these facts, the petitioner is not free to discontinue its intrastate business of transporting gas for consumption to points within the state and thereafter confine itself solely to interstate transportation, then the tax in question is required to be paid as a condition precedent of the petitioner's engaging in such interstate transportation.

Pullman Co. v. Adams, 189 U. S. 420;

Allen v. Pullman Palace Car Co., 191 U. S. 171.

V. The arbitrary power given to the State Tax Commissioner by the statute in question, resulting from the failure of said statute to provide a definite measure of the said tax, operates to deprive petitioner of its property without due process of law and to deny to it the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States,

Yick Wo. v. Hopkins, 118 U. S. 356.

Respectfully submitted,

MALCOLM JACKSON,

R. G. ALTIZER,

Attorneys for Petitioner.

APPENDIX.

Chapter 5, Acts Extraordinary Session of the Legislature of 1919, State of West Virginia.

[Passed March 31, 1919. In effect ninety days from passage. Approved by the Governor April 1, 1919.]

AN ACT to levy a privilege tax on any person, firm or corporation engaged in the transportation of crude oil or petroleum, or the distillates thereof, or of natural gas, by means of pipe lines, authorizing the State Tax Commissioner to provide rules and regulations for the collection of such tax, and defining the duties of the State Tax Commissioner hereunder.

Be it enacted by the Legislature of West Virginia:

Section 1. No person, firm or corporation, hereinafter called company, after the first day of July, one thousand nine hundred and nineteen, shall engage in or continue in the business of the transportation of crude oil or petroleum, or the distillates thereof, or of natural gas, by means of pipe lines, without the payment of an annual privilege tax hereby imposed for engaging in such business; *provided, however*, that nothing contained in this act shall apply to any person, firm or corporation engaged in the business aforesaid where the crude oil, petroleum or distillates thereof, or natural gas, is by the entire system of such person, firm or corporation, transported a distance of less than ten miles.

Sec. 2. Every person, firm and corporation engaged in this state in the transportation of either crude oil or petroleum, or the products and distillates thereof, or of natural gas, or both, by means of pipe lines for sale to consumers within or without the state, or use within or without the state in the making of any products derived therefrom, shall pay to the state, as an annual privilege tax for engaging in such business in the state, two cents for each barrel of crude oil or petroleum, or the distillates thereof, and one-third of one cent for each thousand cubic feet of such natural gas as is so transported or conveyed within this state. *Provided*, that only one such tax, annually, shall be required to be so paid.

Sec. 3. Every person, firm or corporation liable to tax imposed by this act, shall, within sixty days after the first day of July, one thousand nine hundred and nineteen, and within sixty days after the first day of July in each year thereafter, deliver to the State Tax Commissioner a return in writing showing the quantity of crude oil or petroleum, or the distillates thereof, or of natural gas transported or conveyed within this state during the fiscal year ending on the first day of July next preceding. Such return shall be signed and sworn to by the person making the same for himself or a partnership, and by the president, vice-president or other principal accounting officer making the same for a corporation, which return shall be in the form prescribed by the State Tax Commissioner. The State Tax Commissioner is hereby vested with full power and authority and it is hereby made his duty to prescribe forms for returns and assessments and to make, issue and put in force all necessary and needful rules and regulations for

ascertaining and assessing the tax hereby imposed upon every company.

Sec. 4. The State Tax Commissioner shall ascertain and assess the tax upon the company making a return, and shall notify it of the amount of such tax by notice deposited in the post office addressed to such company at its principal office or place of business. Such ascertainment of the tax shall be final and conclusive, unless the same be appealed from in the manner following within thirty days after such notice is so deposited. If any company fail or refuse to make return, the State Tax Commissioner shall proceed, in such manner as may be proper, to obtain the facts and information required to be furnished by such return; and to this end he may, by himself or his duly appointed agent, make examination of the books, records and papers of any such company, and may take the evidence, on oath, of any person who he may believe shall be in possession of facts or information pertinent to the subject of inquiry, which oath he or the agent appointed by him may administer. As soon as possible after procuring such information as he may be able to do with respect to any company failing or refusing to make a return, the State Tax Commissioner shall proceed to ascertain and assess the tax upon such company, and shall notify it of the amount thereof as hereinbefore provided. And his act shall be final as to any company which refused to make a return.

Sec. 5. If any such company, making a return as provided by this act, feels aggrieved by the assessment so made upon it for any year by the State Tax Commissioner, it may apply to the Board of Public Works by petition in writing, within thirty days after the notice is deposited as provided in the preceding section, for a hearing and

a correction of the amount of the tax so assessed upon it by the State Tax Commissioner, in which petition shall be set forth the reasons why such hearing should be granted and the amount such tax should be reduced. The board shall promptly consider such petition, and may grant such hearing or deny the same. If denied, the petitioner shall be forthwith notified thereof; if granted, the board shall notify the petitioner of the time and place fixed for such hearing. After such hearing the board may make such order in the matter as may appear to them just and lawful, and shall furnish a copy of such order to the petitioner.

Sec. 6. No injunction shall be awarded by any court to restrain the collection of all or any of the taxes imposed and assessed under this act, except upon the ground that the assessment thereof was in violation of the constitution of the United States, or of this state; or, that the same were fraudulently assessed; or, that there was a mistake made in the amount of taxes assessed; and in case of a mistake no such injunction shall be awarded, unless application shall be first made to the Board of Public Works to correct the alleged mistake, and the board shall refuse to do so, which fact shall be stated in the bill unless the complainant pay to the treasury of the state all taxes appearing by the bill of complaint to be owing.

Sec. 7. Every company so assessed with taxes shall pay the same into the state treasury within sixty days after the date of the mailing of the notice of the amount thereof, or within thirty days after notification of the amount thereof, when ascertained and assessed by the Board of Public Works on appeal. All taxes assessed under provisions of this act against any such company

shall constitute a debt to the state, and may be collected by action of assumpsit or appropriate judicial proceeding, which remedy shall be in addition to all other existing remedies for the collection of taxes. It shall be the duty of the State Tax Commissioner to proceed to collect such taxes with a penalty of ten per centum added thereto, if not paid when due. At the time of paying the taxes the State Tax Commissioner shall issue to the company paying the same a certificate of payment for the proper fiscal year.

Sec. 8. Any person required or authorized by law to make, sign or verify any return by this act, who makes any false or fraudulent return or statement with intent to defraud the state or defeat or evade the payment of the tax, or any part thereof, imposed by this act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred dollars, nor more than five thousand dollars, to which fine shall be added the costs of prosecution.

Sec. 9. Any person engaging or continuing in the business aforesaid without having first secured a license, as hereinbefore provided, shall be liable to a fine of not less than one thousand dollars nor more than ten thousand dollars.

Sec. 10. All acts and parts of acts inconsistent herewith are hereby repealed.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1920.

UNITED FUEL GAS COMPANY, a corporation,
Petitioner,

v.) No. 835 on writ of error.

WALTER S. HALLANAN, Tax Commissioner of the
State of West Virginia, and E. T. ENGLAND,
Attorney General of the State of West
Virginia, Respondents.

SIRS:

Please take notice that upon a certified copy of the transcript of the record herein and upon the annexed petition of United Fuel Gas Company, a corporation, we shall move the motion hereto annexed before the Supreme Court of the United States, at the Capitol, in the City of Washington, District of Columbia, on Monday, the 2nd day of May, 1921, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, and we shall then and there move for such further relief in the premises as may be just.

Dated at Charleston, West Virginia, this 7th day of April, 1921.

Malcolm Jackson,

E. W. Knight,

Attorneys for Petitioner.

To Messrs:

S. B. Avis,

F. O. Blue,

W. G. Mathews,

John T. Simms,

Attorneys for Respondents.

And to Walter S. Hallanan, Tax Commissioner,
and E. T. England, Attorney General,
of the State of West Virginia,
Respondents.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1920.

UNITED FUEL GAS COMPANY, a corporation,
Petitioner,

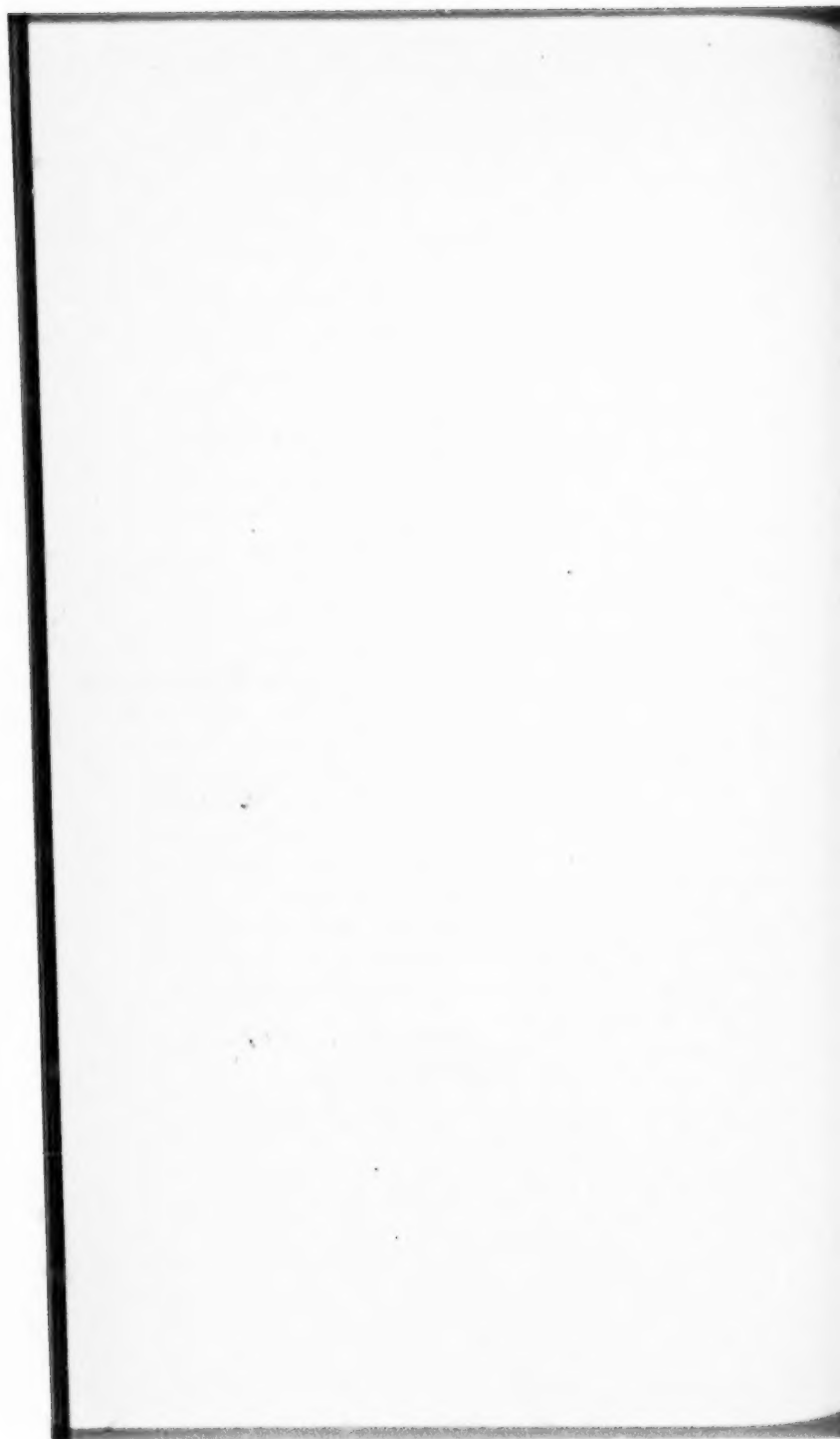
vs.) No. 835 on writ of error.

WALTER S. HALLANAN, Tax Commissioner of the
State of West Virginia, and E. T. ENGLAND,
Attorney General of the State of West
Virginia, Respondents.

And now comes the petitioner, by *Malcolm Jackson* ^{*and E. T. England*},
its attorneys, and moves this court, upon a certified copy
of the transcript of the record herein and upon the an-
nexed petition, sworn to on the 7 day of April,
1921, for a writ of certiorari, directed to the Supreme
Court of Appeals of West Virginia, to bring before this
Honorable Court, for review, the proceedings herein in
said Court of West Virginia, and for the correction of
the alleged errors in the final decree of said Court of
West Virginia, and for such other and further relief in
the premises as may be just.

Malcolm Jackson
E. T. England

Of counsel for Petitioner.



OCT 10 1921

WM. R. STANSBURY

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1921.

No. [REDACTED] 276

UNITED FUEL GAS COMPANY,)
<i>Plaintiff in Error,</i>)
<i>vs.</i>	) Writ of Error to
WALTER S. HALLANAN, State	) the Supreme Court
Tax Commissioner, and E. T.	) of Appeals of the
ENGLAND, Attorney General,	) State of West Vir-
of the State of West Virginia,	) ginia.
<i>Defendants in Error.</i>)

UNITED FUEL GAS COMPANY,)
<i>Petitioner,</i>	) Petition for Writ
<i>vs.</i>	) of <i>Certiorari</i> to
WALTER S. HALLANAN, State	) the Supreme Court
Tax Commissioner, and E. T.	) of Appeals of the
ENGLAND, Attorney General,	) State of West Vir-
of the State of West Virginia,	) ginia.
<i>Respondents,</i>)

REPLY BRIEF FOR PLAINTIFF IN ERROR AND
PETITIONER.

TABLE OF CASES CITED.

	PAGE
Ohio Railway Commission vs. Worthington, 225 U. S. 201 -----	5
Osborn vs. Florida, 164 U. S. 650 -----	8
Pennsylvania Gas Company vs. Public Service Com- mission, 252 U. S. 23 -----	7
Public Utilities Commission vs. Landon, 249 U. S. 245 -----	4
Swift & Company vs. United States, 196 U. S. 398-----	4
Texas & New Orleans Railway Company vs. Sabine Tram Company, 227 U. S. 111 -----	5
Western Union Telegraph Company vs. Foster, 247 U. S. 112 -----	5



IN THE
Supreme Court of the United States

OCTOBER TERM, 1921.

No. 835.

UNITED FUEL GAS COMPANY,)
 Plaintiff in Error,)
 vs.) Writ of Error to
WALTER S. HALLANAN, State) the Supreme Court
 Tax Commissioner, and E. T.) of Appeals of the
ENGLAND, Attorney General,) State of West Vir-
of the State of West Virginia,) ginia.
 Defendants in Error.)

UNITED FUEL GAS COMPANY,)
 Petitioner,) Petition for Writ
 vs.) of *Certiorari* to
WALTER S. HALLANAN, State) the Supreme Court
 Tax Commissioner, and E. T.) of Appeals of the
ENGLAND, Attorney General,) State of West Vir-
of the State of West Virginia,) ginia.
 Respondents,)

REPLY BRIEF FOR PLAINTIFF IN ERROR AND
PETITIONER.

The brief filed by counsel in behalf of the Tax Commissioner of West Virginia and other defendants in error, requires only a short reply.

DEFENDANTS MOVE TO DISMISS THE WRIT OF ERROR.

The motion to dismiss is based on the proposition that the Supreme Court of West Virginia construed the statute as not authorizing a tax to be imposed directly or indirectly on interstate commerce and therefore there has been no decision in favor of the validity of the law, which the Gas Company alleged to be invalid on the ground of repugnancy to the constitution of the United States of America.

In addition to what was said on this subject in our main brief it is to be noted that the lower Court sustained the validity of the statute against one federal ground alleged by the Gas Company, namely, the failure of the statute to adopt a unit of quantity on which the money rate of taxation is based.

The decision of the Court on this question, we submit, can only be reviewed by a writ of error.

Counsel for defendants in error elaborate on what they term a "false postulate" on our part. The "false postulate" is a creation of their own. Nowhere in the Bill or in our brief is it asserted that the contracts between the Gas Company and the four purchasing companies prevented the latter from disposing of the gas as they saw fit.

The quotations from the Bill on pages 6 *et seq.* of their brief, show the facts as alleged by the Gas Company:

(1) The gas supplied the four purchasing companies is sold under contracts, made long before the passage of the statute, and cover a period of years yet to run.

(2) The gas was purchased for the purpose and with the intent that the principal part thereof would be transported in interstate commerce to consumers in other states.

(3) Each purchasing company bound itself by the contract, and afterwards did construct, to the terminus of one of the main trunk lines of the Gas Company a connecting pipe line for the purpose of transporting by continuous pipe line to the localities outside of West Virginia the gas purchased by it, "except a comparatively small portion, which it was contemplated would be sold and has been sold" along its line in West Virginia.

(4) Under these contracts "it was contemplated and intended by the parties thereto" and the Gas Company "bound itself to transport by means of pipe lines in the State of West Virginia large quantities of natural gas for transportation by each of said purchasing companies to localities in other states there to be used and consumed, by means of continuous pipe lines from where such natural gas was produced."

(5) The gas heretofore delivered and sold, now being delivered and sold, and which will in the future be delivered and sold under these contracts "has been, is and will be transported mainly for sale and use at places outside the State of West Virginia."

(6) Ever since there have been deliveries under the contracts, the principal part of the gas purchased has been transported from the points of production without interruption in its flow into other states in pursuance of the objects and purposes of the contracts and in accordance with the intention of the parties thereto.

The use of italics in counsel's brief seems to imply criticism of the word "contemplate" as used in the Bill. "Contemplate" has the meaning "to intend", "to purpose"; and the Bill in addition to the word "contemplated" also avers "intended".

In *Public Utilities Commission v. Landon*, 249 U. S. 245, this Court said:

"Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods."

"Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."

Swift & Co. v. United States, 196 U. S. 398-9.

The claim by counsel on page 9 of their brief that Paragraph 5 of the Answer denies the allegations quoted from the Bill is unfounded. There is no denial; the Answer merely avers matters not mentioned in the Bill, and which are relied on as a defense to the facts alleged therein.

(a) Counsel seem to argue that the right of the purchasing companies, in the absence of any provision in the

contracts to the contrary, to dispose of the gas "as they may elect and determine", is fatal to an interstate movement as claimed by us. But this court in *Western Union Telegraph Co. v. Foster*, 247 U. S. 112-3, pointed out that in *Texas & New Orleans R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 126, there was no contract, which prevented the purchaser of the lumber from giving it a different destination, and said: "Practice, intent and the typical course, not title or niceties of form, were recognized as determining the character."

That part of the stipulation referred to in counsel's brief (p. 11) in no way controverts the allegation of the Bill. The percentage of the gas sold and delivered outside of West Virginia by the four purchasing companies are, as stated, stipulated to be true, and the explanation thereafter as to the manner in which these percentages were arrived at, and accepted by both parties as a correct method of calculation, in no way qualifies the facts as stipulated.

In their discussion of *Ohio R. R. Commission vs. Worthington*, 225 U. S. 201 (p. 30 of brief), counsel omit material facts appearing in the record of that case.

(a) The coal shipped by an operator was sometimes sold at Cleveland or Huron f. o. b. vessels; that is the title passed to the purchaser in the State of Ohio after transportation from the mines to the point of delivery.

(b) The coal shipped might be diverted en route and sold for commercial use at Huron or elsewhere.

So that the operator never knew what particular car of coal or how much or what percentage of the coal would in the end pass from the state of Ohio into other states, either for sale by himself or by purchasers to whom he sold f. o. b. vessels at Huron or Cleveland. The operator

was perfectly free to divert any part of the coal en route.

Nevertheless this Court held that the facts showed an established business resulting in large interstate shipments of coal from mines in the No. 8 District of Ohio (but not definitely ascertained at the time of shipment), to lake ports outside of Ohio, and that the amount ascertained by the vessel shipments could not be controlled by a state law.

In the case at bar we have an established business for the sale and transportation of large quantities of gas from West Virginia into other states under contracts made for that purpose, including the establishment of continuous pipe lines through which the gas moves without interruption of flow from the points of production; and in this case the purchaser instead of the seller diverts a portion of it en route. It seems to us clear that the decision in the Worthington case would not have been affected if the coal had been purchased f. o. b. cars at mines by a middleman.

The distinction taken by the Supreme Court of West Virginia between the movement of the gas sold to the Ohio Fuel Supply Company and that sold to the other three purchasing companies (Rec. page 89) is, we submit, inconsistent with its holding, that the gas transported by the Gas Company through its own pipe lines into other states and there sold to consumers, is unquestionably interstate commerce. The Gas Company never knows, and it cannot be known, what part of the gas flowing from the wells into the pipe lines will be sold to customers along its lines in West Virginia, and what part will be delivered to consumers in other states; and the distinction is in-

consistent with the decision of this court in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, where it was held that the transportation of gas from the source of supply in Pennsylvania to certain towns in New York was interstate commerce, notwithstanding gas was sold en route to consumers in certain cities in Pennsylvania.

The lower court says that the percentages set out in the stipulation may vary in a subsequent year. We are unable to see how this affects the existing situation, nor would it affect the administration of the Statute, because the privilege tax is to be paid in advance, and is to be determined by the amount of gas transported during the preceding year.

In discussing whether the statute is invalid because of its failure to define the unit of quantity, counsel (p. 48) deny that arbitrary power is given the Tax Commissioner either by the Statute or under the decision of the lower Court. They say "So far as appears from the record gas is purchased and sold at a uniform pressure. If so it would be the manifest duty of the State Tax Commissioner to adopt such uniform pressure as the basis of tax measurement. If as a matter of fact gas is purchased and sold under different pressures, it would be the duty of the State Tax Commissioner to adopt a pressure ordinarily used in the course of trade throughout the State."

Counsel do not claim that these suggestions are founded on anything in the record. On the contrary the record is clearly against them. The Tax Commissioner, whose duties require him to be familiar with the production, transportation, sale and consumption of gas in West Virginia, assisted by able counsel, answered the allegations of the Bill attacking the statute on this ground (Rec. p. 38).

No claim is made in the Answer that gas is purchased and sold or transported at a uniform pressure, or that there is any pressure ordinarily used in the course of trade or in transportation throughout the State. The only defense made is that the Gas Company could be taxed on the amount of gas bought and sold by it.

We also have in the record (Rec. p. 28) Exhibit B with the Bill, which is the form of return sent out by the Tax Commissioner, with a copy of the statute and his regulations on the back thereof. The Tax Commissioner neither adopted nor suggested any pressure for measuring the gas, nor any rule which could make the law equal and uniform.

We agree with counsel that the number of cubic feet of gas under one pressure at a given temperature can by the use of tables be computed into the proper number of cubic feet under a different pressure, which shows how easily a Legislature could have adopted a standard pressure to govern the transportation of this commodity.

Osborn v. Florida, 164 U. S. 650, merely determined that the decision of the Supreme Court of Florida, holding the statute in that case to be sufficiently definite, did not present a federal question. It has no application to the case at bar.

But if the decision of the lower court leaves to the discretion of the Tax Commissioner the determination of a standard pressure, or the adoption of a rule which does not make the statute operate in an equal and uniform manner in the transportation of natural gas, we have a federal question for the determination of this Court.

Respectfully submitted,

R. G. ALTIZER,

MALCOLM JACKSON,

Attorneys for Plaintiff
in Error.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF NEW YORK.
IN EQUITY, No. 295.

THE STATE OF NEW YORK AND
CHARLES D. NEWTON, Personally
and as Attorney-General of the
State of New York,

Appellants,

against

THE UNITED STATES AND EDGAR E.
CLARK, CHARLES C. McCHORD,
BALTHASAR H. MEYER, HENRY
C. HALL, WINTHROP M. DANIELS,
CLYDE B. ACHESON, ROBERT E.
WOLLEY, JOSEPH B. EASTMAN,
HENRY J. FORD and MARK W.
POTTER, constituting The Inter-
state Commerce Commission
and (intervening) Lehigh Val-
ley Railroad Company; The
Lehigh & Hudson River Rail-
road Company; New York, On-
tario & Western Railway
Company; Erie Railroad Com-
pany; New Jersey & New
York Railroad Company; Dela-
ware, Lackawanna & Western
Railroad Company; The Dela-
ware & Hudson Company;
Greenwich & Johnsonville Rail-
way Company and Schoharie
Valley Railway Company,

Appellees.



(28,206)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920

No.

849

THE STATE OF NEW YORK AND CHARLES
D. NEWTON PERSONALLY AND AS
ATTORNEY OF THE STATE OF NEW
YORK

vs.

THE UNITED STATES OF AMERICA, THE
INTERSTATE COMMERCE COMMIS-
SION ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF NEW
YORK.

I N D E X

	Original and Print.
Caption	1
Petition and Bill of Complaint	3
Paper 1. Order of Public Service Commission of New York relative to passenger fares	28
Paper 2. Opinion of Public Service Commission of New York relative to passenger fares	29
Paper 3. Petition of Carriers to Interstate Commerce Commission	37
Paper 4. Stenographic minutes of hearing before I. C. C. Examiner Mr. Wilbur La Roe	59
Paper 5. Report, findings and order of Interstate Com- merce Commission in No. 11623	182
Paper 6. Location of railroads in the State of New York.	214
Order to show cause	228
Answer of the United States	231

Answer of Interstate Commerce Commission.....	239
Order permitting Schoharie Valley Railway Co. to intervene.....	255
Petition Schoharie Valley Railway Co. for leave to intervene.....	256
Order permitting Greenwich & Johnsonville Ry. Co. to inter- vene	260
Petition Greenwich & Johnsonville Ry. Co. for leave to inter- vene	261
Order permitting Delaware & Hudson Co. to intervene.....	265
Petition Delaware & Hudson Co. for leave to intervene.....	266
Order permitting Lehigh & Hudson River Ry. Co. to inter- vene	270
Petition Lehigh & Hudson River Ry. Co. for leave to inter- vene	271
Petition Erie R. R. for leave to intervene.....	274
Order permitting Erie R. R. to intervene.....	277
Petition N. J. & N. Y. R. R. Co. for leave to intervene.....	278
Order permitting N. J. & N. Y. R. R. Co. to intervene.....	282
Order permitting Lehigh Valley R. R. Co. to intervene.....	284
Petition Lehigh Valley R. R. Co. for leave to intervene.....	285
Petition New York, Ontario & Western for leave to inter- vene	288
Order permitting New York, Ontario & Western to intervene.....	292
Petition Delaware, Lackawanna & Western R. R. Co. for leave to intervene	293
Order permitting Delaware, Lackawanna & Western to intervene	297
Stenographers' Minutes	299
Defendants' 1st Exhibit (Ex Parte 74, Opinions and Orders).....	308
Defendants' 2nd Exhibit (Orders of Public Service Commis- sion of New York)	300
Defendants' 3rd Exhibit (Opinion of Public Service Commis- sion of New York relative to freight rates).....	408
Defendants' 4th Exhibit (Colloquy before Interstate Com- merce Commission as to Introducing Ex Parte 74 in evi- dence)	416
Opinion of the District Court on application for interlocutory injunction	422
Final decree denying preliminary injunction and dismissing petition	444
Petition on appeal	446
Order allowing appeal	448
Citation on appeal	450
Assignment of Errors	453
Praeclipe	460
Bond	464
Clerk's certificate	466

IN THE
DISTRICT COURT OF THE UNITED
STATES —

NORTHERN DISTRICT OF NEW YORK.

THE STATE OF NEW YORK and
CHARLES D. NEWTON, Personally
and as ATTORNEY-GENERAL OF
THE STATE OF NEW YORK,
Plaintiffs,

against

THE UNITED STATES and EDGAR
E. CLARK, CHARLES C. McCHORD,
BALTHASAR H. MEYER, HENRY C.
HALL, WINTHROP M. DANIELS,
CLYDE B. ACHESON, ROBERT E.
WOLLEY, JOSEPH B. EASTMAN,
HENRY J. FORD and MARK W.
POTTER, Constituting THE IN-
TERSTATE COMMERCE COMMISSION,
Defendants.

PETITION AND BILL OF COMPLAINT

*To the Honorable the Judges of the District
Court of the United States for the Northern
District of New York:*

The State of New York, Charles D. Newton, per-
sonally and as Attorney-General of the State of

Complaint

6

New York, bring this Bill of Complaint against the United States and the Interstate Commerce Commission and respectfully show unto this Honorable Court and allege as follows:

[7

8

9

10

1. That the plaintiff, the State of New York, is one of the States of the United States, and Charles D. Newton is Attorney-General of the State of New York, duly qualified and acting as such, and is a citizen of the State of New York and the United States, and have legal capacity to sue herein as will be made to more particularly appear with all other necessary allegations of jurisdictional facts that can hereinafter be more conveniently and precisely pleaded. The United States is made a party defendant herein by virtue of the authority and requirements of the Act of October 22, 1913, (38 State L. 219) and known as the District Court Act and because the Interstate Commerce Commission, defendant herein, claims to have derived its authority for the unconstitutional and illegal acts committed by said Interstate Commerce Commission, and hereinafter complained of from said defendant, the United States, and because the unconstitutional statutes hereinafter complained of were enacted pursuant to the authority of said defendant, the United States. The Interstate Commerce Commission, a defendant herein, is a regulatory body over common carriers engaged in interstate commerce established and existing under an Act of Congress known as the Interstate Commerce Act and consists of the following persons with their

Complaint

11

residences as nearly as complainants can ascertain:

Edgar E. Clark, residing in the State of Iowa.
Charles C. McChord, residing in the State of Kentucky.

Balthasar H. Meyer, residing in the State of Wisconsin.

12

Henry C. Hall, residing in the State of Colorado.

Winthrop M. Daniels, residing in the State of New Jersey.

Clyde B. Acheson, residing in the State of Oregon.

Robert W. Wooley, residing in the State of Virginia.

13

Joseph B. Eastman, residing in the State of Massachusetts.

Henry J. Ford, residing in the State of New Jersey.

Mark W. Potter, residing in the State of New York.

14

2. That this suit involves questions arising under the Constitution and Laws of the United States and is a case in which a State is a party and in which the United States and officers thereof are defendants as will be made to appear more particularly herein, and the amount involved in the controversy as to each of the parties is in excess of \$3,000 exclusive of interest and costs.

15

3. That on or about the 28th day of December, 1917, the President of the United States took possession and control of the steam railroads operating as common carriers within the State

Complaint

16 of New York under the war powers pursuant to authority conferred by Congress.

4. That prior to May 28, 1918, the said common carriers had filed, published and put into effect certain schedules of fares, rates and charges which were then and had been demanded and collected by said common carriers for the transportation of passengers, milk and cream, excess baggage and space in sleeping and parlor cars in accordance with the laws and constitution of the State of New York as made and provided.

5. That on or about the 28th day of May, 1918, the Director General of Railroads of the United States of America in disregard of the laws and constitution of the State of New York, but pursuant to the authority conferred upon him by Congress under the war powers authorized said common carriers to increase in certain respects the rates, fares and charges in effect as aforesaid for the transportation of passengers and commodities generally within the State of New York in intrastate traffic.

6. That pursuant to and in accordance with said authorization the said common carriers increased their fares and charges for the transportation of passengers and commodities in intrastate traffic within the State of New York.

7. That on or about the 1st day of March, 1920, the United States of America relinquished the possession, control and operation of said common carriers, but by statute provided that no rate, fare or charge then in effect should be reduced by or under the laws of the State of New York prior to the 1st day of September, 1920, without

Complaint

21

the consent of the Interstate Commerce Commission.

8. That on September 1, 1920, the laws and constitution of the State of New York in respect to the rates, fares and charges of said common carriers engaged in intrastate commerce within the State of New York again became effective, but said common carriers, continued to demand and collect the rates and charges previously authorized by the Director General of Railroads until November 29, 1920. 22

9. That on the 29th day of July, 1920, the Interstate Commerce Commission, defendant herein, in a proceeding known as Ex Parte 74, 58 I. C. C. 220, authorized within a region that includes the State of New York an increase of 40 per centum in the interstate freight rates, 20 per centum in the interstate passenger fares, baggage charges and rates for milk and cream and also a surcharge of 50 per centum of the charge for space in sleeping and parlor cars in interstate carriage to accrue to said steam railroads operating as common carriers within the State of New York and elsewhere. 23 24

10. That thereafter the said steam railroads operating within the State of New York as common carriers made informal application to the Public Service Commission, Second District of the State of New York, a regulatory body of the State of New York having general jurisdiction over common carriers engaged in intrastate commerce, for permission to file effective on five days' notice tariff supplements providing increases in 25

Complaint

26

the rates, fares and charges applicable to intrastate traffic within the State of New York and corresponding to those authorized for interstate traffic by the Interstate Commerce Commission as aforesaid.

27

11. That so far as said application to said Public Service Commission related to the transportation of freight, except milk and cream, it was granted by said Public Service Commission by an order duly entered the 19th day of August, 1920, but so far as said application related to the transportation of passengers in intrastate commerce it was denied by order of the same date, as will more fully appear by true and complete copies of said order and the opinion of said Public Service Commission which are attached hereto, made a part hereof as if pleaded herein and marked "papers 1 and 2."

28

29

12. That thereafter a few of the steam railroads serving the State of New York as common carriers filed with the Interstate Commerce Commission a petition, which was received by said Commission, pretending to act under authority of the Laws of the United States, as will more fully appear from a true and complete copy of said petition which is attached hereto, made a part hereof as if pleaded herein and marked "paper 3."

30

13. That thereafter by order made on the 8th day of September, 1920, the Interstate Commerce Commission, pretending to act under authority of the Laws of the United States, set a hearing upon said petition before one Mr. Wilbur La Roe, Jr., Chief Examiner of said Interstate Commerce Commission, on its behalf in the City

Complaint

31

of New York on the 13th day of September, 1920, and said hearing was held as will more fully appear from a true and complete copy of the stenographic minutes of said hearing which are attached hereto, made a part hereof as if pleaded herein and marked "paper 4."

32

14. That the State of New York, through its Governor, was duly notified by the Interstate Commerce Commission of such hearing as by the statute of the United States made and provided and the State of New York formally and duly appeared therein, as a party respondent, by its Attorney-General, Charles D. Newton, and objected to the jurisdiction of the Interstate Commerce Commission.

33

15. That thereafter the hearing for argument was set by said Interstate Commerce Commission on the aforesaid record made before said La Roe and had before it, where said Commission pretended to act under the authority of the Laws of the United States, at its hearing room in the City of Washington, D. C., on the 11th day of October, 1920, at which time and place the State of New York, formally and duly attended by its Attorney-General as a respondent therein and objected to the jurisdiction of the Interstate Commerce Commission.

34

16. That thereafter the Interstate Commerce Commission, pretending to act under the authority of the Laws of the United States, on the 13th day of November, 1920, made its report, findings and orders on said petition, and among other things complained of herein set aside and declared

35

36

Complaint

37 null and void the existing rates, fares and charges for intrastate commerce allowed railroads operating as common carriers in the State of New York under the laws and constitution of the State of New York and under their charters and franchises conferred upon them by the State of New York, as will more fully appear by a true and complete copy of said report, findings and orders which are attached hereto, made a part hereof, as if pleaded herein, and marked "paper 5."

38 17. That thereafter the railroads operating within the State of New York in intrastate commerce including some electric railways and which were joined in said order (with the exception of a few which are and had been defunct or have not and had no trackage in the State of New York, and do not and did not do any intrastate business in the State of New York) filed with the Interstate Commerce Commission certain tariffs and schedules increasing the rates, fares and charges for intrastate carriage as in said illegal and unconstitutional report, findings and orders of the Interstate Commerce Commission directed to be effective on the 29th day of November, 1920, and said Interstate Commerce Commission received them, pretending to act under the authority of the Laws of the United States.

40 18. That said railroads are now demanding and collecting, or threaten to demand and collect, the increased fares, rates and charges directed by said illegal and unconstitutional order of the Interstate Commerce Commission.

19. That the New York Central Railroad is a corporation organized and consolidated and doing

Complaint

business under the Laws of the State of New York and consists in part of a four track line running from the City of Albany to the City of Buffalo in the State of New York, chartered under a private law of the State of New York, and known as Laws of 1853, Chapter 76, duly enacted and providing as follows:

“ LAWS OF NEW-YORK

“ CHAP. 76.

“ AN ACT to authorize the consolidation of certain railroad companies.

“ Passed April 2, 1853.

“ The People of the State of New-York, represented in Senate and Assembly, do enact as follows:

“ Section 1. The Albany and Schenectady, Schenectady and Troy, Utica and Schenectady, Syracuse and Utica, Rochester and Syracuse, the Buffalo and Lockport, the Mohawk Valley, and the Syracuse and Utica direct, Buffalo and Rochester, Rochester, Lockport and Niagara Falls Railroad Companies, or any two or more of them, are hereby authorized at any time to consolidate such companies into a single corporation, in the manner following:

“ 1. The directors of any two or more of such corporations may enter into an agreement, under their respective corporate seals, for the consolidation of the said corporations, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number of directors thereof, which shall not be less than thirteen nor more than twenty-three, the time

Complaint

46

and place of holding the first elections of directors, the day for annual elections of directors, the amount of capital, and the number of shares of the stock of the new corporations, which shall not be larger in amount than the aggregate amount of capital of the several companies thus consolidated, and shall not be increased, except in accordance with the provisions of the act passed April second, eighteen hundred and fifty, the manner of converting the shares of capital stock in each of said corporations into the shares of such new corporation, the manner of paying any shareholder that may decline taking shares in the new corporation, with such other details as they may deem necessary to embrace in such agreement, not inconsistent with the provisions of the act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty.

47

48

49

50

"2. Such agreement of the directors shall not be deemed to be the agreement of the said corporations so proposing to consolidate, until after it has been submitted to the stockholders of each of said corporations respectively separately, at a meeting thereof to be called upon a notice of at least thirty days, specifying the time and place of such meeting and the object thereof, to be addressed to each of such stockholders, when their place of residence is known to the secretary and deposited in the post-office, and published for at least three successive weeks in the state paper, and in one of the newspapers printed in each of the counties through or into which the railroad of the said corporation shall extend, and has been sanctioned and approved by such stockholders by the vote of at least two-thirds in amount of the stockholders

Complaint

present at such meetings respectively, voting by ballot in regard to such agreement either in person or by proxy, each share of such capital stock being entitled to one vote; and when such agreement of the directors has been sanctioned and approved by each of the meetings of the respective stockholders separately, after being submitted to such meetings in the manner above mentioned, then such agreement of the directors shall be deemed to be the agreement of the said several corporations, and a sworn copy of the proceedings of such meetings, made by the secretaries thereof respectively, and attached to the said agreement, shall be evidence of the holding and of the action of such meetings in the premises. 51 52

“Section 2. Upon the making of the said agreement mentioned in the preceding section in the manner required therein, and filing a duplicate or counterpart thereof in the office of the secretary of state, and immediately upon and after the first election of directors of **said corporation, the said corporation** shall be merged in the **new corporation provided for in the said agreement**, to be known by the corporate name therein mentioned, and the details of such agreement shall be carried into effect as provided therein, only such new corporation shall not have any larger powers than are granted by the act entitled “An act to authorize the formation of railroad companies and to regulate the same,” passed April second eighteen hundred and fifty, or be exempt from the performance of any duty which the said several corporations may be liable to perform, except as herein provided. 53 54 55

“Section 3. Such new corporation shall possess the general powers, and be subject to the

56

Complaint

57

general liabilities and restrictions expressed in the third title of the eighteenth chapter of the first part of the Revised Statutes; it shall also have the general powers and privileges, and be subjected to the general liabilities, restrictions, duties and provisions expressed and contained in the said act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second eighteen hundred and fifty, and the acts amending the same, so far as the same are applicable to a railroad corporation, where a railroad is constructed and put in operation.

58

59

60

"Section 4. Upon the election of the first board of directors of the said new corporation created by the agreement of the several companies, all and singular the rights, franchises and interests of the said several corporations so consolidated, in and to every species of property real, personal and mixed, the things in action thereunto belonging, shall be deemed to be transferred to and vested in such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with the rights of way, and all other rights of property, franchises and interests, in the same manner and to the same extent as if the said several corporations so consolidated should have continued to retain the title and transact the business of such corporation; and the title and real estate acquired by either of the said corporations shall not be deemed to revert, or be impaired by means of such act of consolidation, or anything relating thereto.

"Section 5. The rights of creditors of any corporations that shall be consolidated, shall not in any manner be impaired by any act of consolidation, nor shall any liability or obli-

gation for the payment of any money now due or hereafter to become due to this state, or any individual, or any claim or demand for damages for any act done, or neglect suffered by any such corporation, be in the manner released or impaired, but such new corporation is declared to succeed to such obligations and liabilities, and to be held liable to pay and discharge all the debts and liabilities of each of the corporations that shall be so consolidated, whether on contract, or for misconduct or neglect, either to this state or to individuals, and it shall be liable to have an action brought against it to enforce the payment of any money or damages, or the performance of any duty which any corporation consolidated into such new corporation was liable to pay or perform, in the same manner as if such new corporation had itself incurred the obligation or liability to pay such money or damages, or perform such duty; and no suit, action or other proceeding now pending before any court or tribunal in which any railroad company that may be so consolidated is a party, shall be deemed to have abated or discontinued, by reason of any such agreement of consolidation; but the same may be prosecuted to final judgment in the same manner as if the said corporation had not entered into such agreement of consolidation, or the said new corporation may be substituted as a party in the place of any corporation of which it shall be composed, by order of the court in which such action, suit or proceeding may be pending.

62

63

64

65

"Section 6. If any stockholder shall, at said meeting of stockholders, or within twenty days thereafter, object to said consolidation, and demand payment for his stock, such stockholder or said new company may,

Complaint

66

if said consolidation take effect at any time thereafter, apply to the supreme court at any special term thereof, held in any county through which any part of the said railroad may pass, for the appointment of three persons to appraise the value of such stock. If the court shall be satisfied that reasonable notice has been given of such application, it shall thereupon appoint three persons to appraise the value of said stock, and shall designate the time and place of meeting of such appraisers, and give such directions in regard to the proceedings on said appraisement as shall be deemed proper, and shall also direct the manner in which payment for such stock shall be made to such stockholder. The court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve, or otherwise; the appraisers shall meet at the time and place designated, and they or any two of them, after being duly sworn honestly and faithfully to discharge their duties, shall estimate and certify the value of such stock at the time of such dissent as aforesaid, and deliver one copy of their appraisal to the said company, and another to the said stockholder, if demanded; the charges and expenses of the appraisers shall be paid by the company. When the corporation shall have paid the amount of the appraisal as directed by the court, such stockholder shall cease to have any interest in the said stock, and in the corporate property of the said corporation, and the said stock may be held or disposed of by the said corporation.

67

68

69

70

“Section 7. When any two or more of the railroad companies named in this act are so consolidated, said consolidated company shall carry way passengers on their road at a rate not to exceed two cents per mile.

Complaint

71

“Section 8. This act shall take effect immediately.”

That the railroads named in said Laws of 1853, Chapter 76, now constituting a part of the New York Central Railroad as aforesaid, accepted the conditions and provisions of said statute by filing 72
a consolidation agreement in the office of the Secretary of State of the State of New York on July 5, 1855, in accordance with said statute and said Laws of 1853, Chapter 76 remains unrepealed by the Legislature of the State of New York and unaffected by any authority judicial or executive of the State of New York, except that said two cent 73
fare was affirmatively duly and lawfully declared again effective on September 1, 1920. Said consolidation agreement and said laws of 1853, Chapter 76, constituting a charter contract, are still in full force and effect with many years to run and the said two cent fare for way passengers on the line between Albany and Buffalo is now the only 74
legal and constitutional fare for intrastate traffic over said line in the State of New York.

20. That the said New York Central Railroad Company is a citizen of the State of New York and a corporation organized and doing business under its laws was one of the parties and the principal party upon whose petition said report, findings and order relative to transportation were 75
made by the Interstate Commerce Commission as aforesaid and had then and has now a residence at the Union Station in the City of Albany, N. Y., where it keeps its principal place for doing business in the State of New York as a corporation

Complaint

76 organized under the Laws of the State of New
York and which is within the Northern District
of New York and said railroad company operates
many miles of railroad with the appurtenances
thereto within said Northern District.

21. That the plaintiff, State of New York, is
77 one of the states of the United States and was a
party in the proceeding before the Interstate
Commerce Commission as aforesaid, and said
railroads joined in said order of the Interstate
Commerce Commission operate within its
boundaries in intrastate commerce, as is more
particularly shown by a schedule which is at-
tached hereto, made a part hereof as if pleaded
78 herein and marked " paper 6;" said railroads in
the carrying on of intrastate commerce within the
State of New York are solely under the dominion
of the State of New York and subject only and ex-
clusively to its laws and constitution. The State
of New York annually expends large sums of
money for milk and cream carried by said rail-
79 roads in intrastate commerce and spends more
~~and less~~ than \$365,000 in purchasing transporta-
tion for its employees traveling on its business
and governmental functions from said railroads,
joined in said order of the Interstate Commerce
Commission. Most of the railroads joined in said
order are corporations chartered under the Laws
80 of the State of New York and are citizens thereof
and all are doing business under the laws of the
State of New York which are set aside and de-
stroyed by the action of the Interstate Com-
merce Commission. The State of New York thus
suffers irreparable damage.

UNITED FUEL GAS COMPANY *v.* HALLANAN,
STATE TAX COMMISSIONER OF THE STATE OF
WEST VIRGINIA, ET AL.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE
OF WEST VIRGINIA.

No. 276. Argued November 9, 10, 1921.—Decided December 12,
1921.

1. A writ of error sustained, following *Eureka Pipe Line Co. v. Hallanan*, *ante*, 265. P. 280.
2. Natural gas, collected and purchased by a pipe line company within a State and moving through its pipes, and the pipes of other companies to which it sells it, in continuous streams destined beyond the State, is a subject of interstate commerce, the transportation of which the State may not tax. P. 280.
3. *Held*, that the interstate character of the gas so destined was not affected by the right of transporting companies to divert to local destinations, or by the fact that smaller quantities for local delivery were commingled with the other and the proportions between the two were not precisely fixed. P. 281.

87 W. Va. 396, reversed; petition for certiorari dismissed.

ERROR to a judgment sustaining a tax in a suit by the plaintiff in error to restrain its enforcement. See the preceding case, *ante*, 265.

Mr. Malcolm Jackson, with whom *Mr. R. G. Altizer* and *Mr. E. W. Knight* were on the briefs, for plaintiff in error.

The final decree is reviewable by writ of error. Jud. Code, § 237; *Merchants' National Bank v. Richmond*, 256 U. S. 635.

Natural gas is an article of commerce and its transportation from one State to another is interstate commerce.

Such transportation is none the less interstate commerce because accomplished by two or more connecting carriers, one or more of which operates within the limits of a single State. *The Daniel Ball*, 10 Wall. 557; *Wabash & C. Ry. Co. v. Illinois*, 118 U. S. 557; *Norfolk & Western R. R. Co. v. Pennsylvania*, 136 U. S. 114; *Railroad Commission v. Texas & Pacific Ry. Co.*, 229 U. S. 336; *Atchison, Topeka & Santa Fe Ry. Co. v. Harold*, 241 U. S. 371.

In determining whether commerce is interstate or intrastate, regard must be had to its essential character—mere billing or the place at which title passes is not determinative.

The transportation and sale of natural gas by plaintiff to other companies for further transportation to points outside the State, under contracts contemplating such interstate transportation, were transactions in interstate commerce, to the extent that said gas was intended to be and actually was transported outside the State, notwithstanding said gas was delivered by plaintiff to the purchaser in West Virginia and notwithstanding a relatively small portion of the gas so delivered was resold by the purchasers to consumers along their lines in West Virginia. *Public Utilities Commission v. Landon*, 249 U. S. 236; *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23; *Ohio R. R. Commission v. Worthington*, 225 U. S. 201.

The intrastate business—transportation from points of production to other localities in the same State, where

the gas is sold to consumers—is conducted by plaintiff as a public service, regulated by the Public Service Commission. The same pipe lines are used for this transportation as those used for transportation to points outside the State. Plaintiff, therefore, not having power voluntarily to withdraw from a public service in West Virginia, is required by the decision under review to pay the tax upon its intrastate business as a condition precedent to continuing the interstate business. *Pullman Co. v. Adams*, 189 U. S. 420; *Allen v. Pullman Co.*, 191 U. S. 171; *Bowman v. Continental Oil Co.*, 256 U. S. 642; *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113.

The arbitrary power given the state tax commissioner, resulting from the failure of the statute to provide a definite measure of the tax, operates to deprive plaintiff of its property without due process of law and to deny to it the equal protection of the laws. *Yick Wo v. Hopkins*, 118 U. S. 356.

Mr. Wm. Gordon Mathews, with whom *Mr. E. T. England*, Attorney General of the State of West Virginia, *Mr. S. B. Avis* and *Mr. Fred O. Blue* were on the brief, for defendants in error.

No substantial federal question is involved and the writ of error should be dismissed and the writ of certiorari denied. Jud. Code, § 237. The court below construed the statute as imposing a tax only upon those engaged in the transportation of natural gas in intrastate commerce, and further construed it as authorizing the tax to be measured only by the amount of such commerce. *Merchants' National Bank v. Richmond*, 256 U. S. 635, distinguished.

[See argument in the preceding case, *ante*, 268, for authorities cited on the merits.]

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity that seeks to restrain the application to the plaintiff of the same statute that has been

considered in *Eureka Pipe Line Co. v. Hallanan*, just decided, *ante*, 265. Acts of Extraordinary Session, 1919, c. 5. The statute taxes the transportation of natural gas as well as of oil by pipe lines and the plaintiff Gas Company makes the same objection that was made by the Oil Company in the former case to the constitutionality of the act, as well as others that it will not be necessary to discuss. The two cases were heard together and were disposed of in a single opinion by the Supreme Court of Appeals. The Circuit Court of the State held the statute void, but the Supreme Court, as before, upheld it as valid with regard to intrastate business "as above defined" and defined the plaintiff's business as intrastate. The plaintiff drew in question the validity of the statute "as construed and applied," *Merchants' National Bank v. Richmond*, 256 U. S. 635, and took this writ of error. It also filed a petition for a writ of certiorari. For the reasons given in the *Eureka Case* the writ of error will be entertained and the petition for certiorari dismissed.

The case was heard upon the pleadings and a stipulation as to facts. It appears that the plaintiff gathers and purchases natural gas, mostly in West Virginia, and distributes it through its pipes which extend to or beyond the state line in various places and also connect with the pipes of other companies that extend beyond the State. The total amount dealt with by the plaintiff in the year ending July 1, 1919, was 54,973,588 M cubic feet of which all but a little over a million M cubic feet was gathered in West Virginia. There were sold directly to consumers in West Virginia 11,590,656 M cubic feet; a little over 10,000,000 M cubic feet to consumers in other States; and the remainder was sold to four connecting companies. It is admitted that the gas sold to one of these, the Ohio Fuel Supply Company, is transported in interstate commerce, so that that may be laid on one side. Another of them is the Columbia Gas & Electric Company. Ninety-

nine per cent. of the gas received by it is carried out of the State and sold, yearly. A third is the Pittsburgh-West Virginia Gas Company which yearly disposes of eighty-eight per cent. of the gas in the same way. The fourth is the Hope Natural Gas Company, which in like manner carries sixty-seven per cent. of the gas bought from the plaintiff out of the State and sells it there.

In short the great body of the gas starts for points outside the State and goes to them. That the necessities of business require a much smaller amount destined to points within the State to be carried undistinguished in the same pipes does not affect the character of the major transportation. Neither is the case as to the gas sold to the three companies changed by the fact that the plaintiff, as owner of the gas, and the purchasers after they receive it might change their minds before the gas leaves the State and that the precise proportions between local and outside deliveries may not have been fixed, although they seem to have been. The typical and actual course of events marks the carriage of the greater part as commerce among the States and theoretical possibilities may be left out of account. There is no break, no period of deliberation, but a steady flow ending as contemplated from the beginning beyond the state line. *Ohio R. R. Commission v. Worthington*, 225 U. S. 101, 108. *United States v. Reading Co.*, 226 U. S. 324, 367. *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 113. We have mentioned only such facts as are sufficient for our decision, and have not noticed other objections urged against the law. What we have stated seems to us enough to condemn it as applied to this case.

Decree reversed.

Petition for certiorari dismissed.

MR. JUSTICE BRANDEIS dissents.

MR. JUSTICE CLARKE also dissents as to the jurisdictional question.